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IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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January Term, 1987

BRUCE TURGISS,

Petitioner

v.

ANNE FASSETT,

Respondent

and

JOHN L. BUCKLEY, JR.
Administrator of the Estate of
MONICA T. BUCKLEY, Deceased,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. UNDER 28 U.S.C. §1291, MAY THE CIRCUIT COURT ASSUME JURISDICTION OVER APPEALS WHEN OUTSTANDING CLAIMS REMAIN AND THE DISTRICT COURT HAS NOT ENTERED A "FINAL JUDGMENT" OR CERTIFIED ITS ORDER?

2. IN A DIVERSITY ACTION, CAN THE CIRCUIT COURT REVERSE THE DISTRICT COURT'S FOLLOWING OF A RECENT STATE SUPREME COURT DECISION IN ORDER TO WRITE A NEW STATE CAUSE OF ACTION?

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PETITION FOR WRIT

Appellants petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit Court of Appeals opinion is reproduced in Appendix A. The District Court's opinion is reproduced in Appendix B and in 625 F. Supp. 325 (E.D. Pa. 1985)

JURISDICTIONAL STATEMENT

The Third Circuit entered an order which denied defendant Turgiss' Petition for Rehearing *en banc* on January 9, 1987. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1291 provides in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

28 U.S.C. §1292(b) provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Federal Rule of Civil Procedure 54(b) provides in pertinent part:

When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment . . . any order . . . which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties.

18 Pa. §6308 provides in pertinent part:

§6308. Purchase, consumption, possession or transportation of intoxicating beverages

A person commits a summary offense if he, being less than 21 years of age, attempts to purchase, purchases, consumes, possesses or transports any alcohol, liquor or malt or brewed beverages. 1972, Dec 6, P.L. 1482, NO. 334, §1, effective June 6, 1973. As amended 1978, April 28, P.L. 202, No. 53, §7(8), effective June 27, 1978.

18 Pa. §306 provides in pertinent part:

§306. Liability for conduct of another; complicity

(a) General rule. — A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(b) Conduct of another. — A person is legally accountable for the conduct of another person when:

> (1) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct;

(2) he is made accountable for the conduct of such other person by this title or by the law defining the offense; or

(3) he is an accomplice of such other person in the commission of the offense.

(c) Accomplice defined. — A person is an accomplice of another person in the commission of an offense if:

(1) with the intent of promoting or facilitating the commission of the offense, he:

(i) solicits such other person to commit it; or

(ii) aids or agrees or attempts to aid such other person in planning or committing it; or

(2) his conduct is expressly declared by law to establish his complicity.

(d) Culpability of accomplice. — When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

STATEMENT OF THE CASE

Plaintiffs Anne Fassett and John L. Buckley, Jr., Administrator of the Estate of Monica Buckley, filed separate diversity actions against defendant Bruce Turgiss and other defendants in the Eastern District of Pennsylvania. Both complaints asserted Pennsylvania's new social host liability cause of action against the named defendants because of a tragic auto accident.

On the night of September 25-26, 1982, the Delta Kappa Epsilon fraternity chapter of Villanova University sponsored a semi-formal party at a large apartment in Philadelphia's Overbrook section. Defendants Turgiss, Bacha, Zacchea, and Troy were the apartment's lessees and all had agreed to host the party. Defendant Poch was president of the fraternity, and defendant Hoffend was the treasurer who wrote a blank check which fraternity members used for purchase of alcoholic beverages in Maryland. According to the record, the party featured the service of alcoholic beverages to approximately 200 minors.

Third party defendant Corbin Evans offered to drive home plaintiff Anne Fassett, plaintiff John L. Buckley's daughter Monica, and two others during the early morning hours of September 26. Evans had apparently been drinking alcoholic beverages at the party even though he was a minor. Evans' car allegedly ran a stop sign six hundred feet from the party site, and his vehicle collided with Nicholas D'Alessandro's pickup truck. This collision killed Monica Buckley and rendered Anne Fassett a quadriplegic.

Plaintiffs filed state court actions against Evans and D'Alessandro in Philadelphia County. Plaintiff Buckley's state court action resulted in the parties filing a Joint Tortfeasor Release for the sole consideration of $275,000. (B-9)

Plaintiff Fassett's state court action voluntarily dismissed D'Alessandro and plaintiff Fassett won a verdict of approximately $5,100,000 against Evans. (B-7)

Following the state court litigation, the plaintiffs sought to prove liability against the Delta Kappa Epsilon fraternity's local and national organizations and the present group of defendants. Fassett's action did not include Hoffend as a defendant, while the Buckley action did not claim against Bacha. (B-7-9)

Plaintiff Fassett's cause alleged that each defendant caused the service of alcoholic beverages to minor

Corbin Evans. Evans was allegedly under the influence of alcohol when he wrecked his vehicle. (B-8) Fassett's complaint asserted that the defendants' negligence consisted of *service* (emphasis added) of intoxicants to Corbin Evans. (B-8)

Plaintiff Buckley's action alleged that the defendants "unlawfully agreed and conspired" to provide alcoholic beverages to minors at the party (B-9). Buckley's complaint also alleged that the defendants acted "in concert when they provided alcoholic beverages to a minor such as Corbin Evans. (B-9-10)

Following the plaintiffs' filing of the complaints, the parties began to file a slew of third party complaints and cross-claims. Due to the large number of claims, the District Court ordered each complaining party to submit written offers of proof stating their factual claims against each allegedly liable defendant. Each written offer of proof was to be similar to an opening statement. (B-11)

On September 12, 1985, the District Court held a lengthy hearing which gave the plaintiffs and third party plaintiffs an opportunity to verbally supplement their offers of proof in open court.

Because the plaintiffs had chosen not to oppose Delta Kappa Epsilon's summary judgment motions, the District Court confronted summary judgment motions filed by first party defendants Turgiss, Bacha, Zacchea, Troy, Poch and Hoffend as well as the third party motions.

Applying Pennsylvania law in a diversity case, the District Court reviewed "current Pennsylvania law concerning social host liability" in order to answer two key questions:

> 1) Whether Pennsylvania would recognize a cause of action against a *minor* social host for serving/furnishing alcohol to another minor, proximately resulting in personal injuries and/or death to the intoxicated minor or to third persons; and

2) What conduct constitutes serving/furnishing alcohol in the social host liability setting? (B-12-13)

After reviewing recent Pennsylvania Supreme and Superior Court decisions regarding social host liability, the District Court determined that minor social hosts could be found liable. However, the District Court also stated that recent Pennsylvania social host cases required that the plaintiff "establish that the defendant actually furnished intoxicants to the minor" in order to prove social host liability. (B-21)

Because Pennsylvania courts had not defined "what conduct amounts to 'furnishing' " intoxicants, the District Court reviewed the law of other jurisdictions and concluded that "furnishing" alcohol was "the physical act of serving alcoholic beverages directly to a minor guest." (B-27)

According to the District Court, the plaintiffs had to prove that a given defendant served alcohol directly to Corbin Evans in order to sustain a valid cause of action. (B-27)

The District Court found a genuine issue of fact as to defendant Christopher Troy's possible service of alcohol to Corbin Evans (B-28). Because the plaintiffs could not show a Federal Rule of Civil Procedure 56 "genuine issue of fact" regarding the other first party defendants' service of alcohol to Evans, the District Court granted summary judgment in favor of first party defendants Turgiss, Bacha, Zacchea, Poch and Hoffend on September 18, 1985. Due to the rulings, Peter Wynne, Evans and D'Alessandro were the only remaining third party defendants in the Buckley action, whereas Evans and D'Alessandro were the only third party defendants left in Fassett's cause. (B-29)

Faced with the prospect of proceeding against only first party defendant Troy, the plaintiffs filed a Rule 41(a)(1) stipulation of dismissal without prejudice as to Troy on September 23, 1985. (A-13)

Both plaintiffs then appealed to the Third Circuit Court of Appeals.

Most of the third party defendants filed dismissal motions with the Third Circuit's motion panel. The panel granted these motions without prejudice to defendants' right to reinstate third party complaints should the District Court be reversed. (A-13)

Plaintiffs also filed a Fed. R. App. P. 10(3) motion to augment the record with the deposition testimony of Christopher Wackerman. Wackerman allegedly testified that he had seen defendant Turgiss serving intoxicants to party guests. On January 14, 1986, the District Court granted the plaintiffs' motion to augment the record with Wackerman's deposition testimony.

Following oral argument on September 15, 1986, a divided panel of the Third Circuit voted 2-1 to reverse the District Court's rulings as to Pennsylvania's social host cause of action and the motion to augment the record.

The Third Circuit panel majority remanded the plaintiff's action to the District Court on December 5, 1986 in order for the trial court to determine whether the first party defendants intentionally rendered substantial assistance to minor Corbin Evans in his consumption of intoxicants. (A-36)

Defendants Turgiss, Poch, Hoffend, Zacchea and Bacha filed a Petition for Rehearing *en banc* which the Third Circuit denied on January 9, 1987. The Third Circuit denied defendant Turgiss' Motion to Stay the Mandate on March 20, 1987.

I. THE CIRCUIT COURT DID NOT HAVE JURISDICTION OVER THE PLAINTIFFS' APPEAL BECAUSE THE DISTRICT COURT'S ORDER WAS NOT A 28 U.S.C. §1291 "FINAL DECISION".

Defendant Turgiss submits that the Circuit Court was incapable of asserting jurisdiction over the plaintiffs' appeal of the District Court's September 18, 1985 order

because plaintiffs' claims against defendant Troy were still outstanding.

According to 28 U.S.C. §1291, the Circuit Court "shall have jurisdiction of appeals from all final decisions" of the District Courts. Defendant Turgiss contends that the District Court did not render a "final decision" worthy of a Section 1291 appeal. The Supreme Court has said that the strict application of Section 1291 effectively "preserves the historic federal policy against piecemeal appeals." *Sears, Roebuck and Co. v. Mackey*, 351 U.S. 427, 438, 76 S. Ct. 895, 901, 100 L.Ed. 1297 (1956).

Plaintiffs had two other avenues for appealing the District Court's order of September 18, 1985.

According to Federal Rule of Civil Procedure 54(b), a trial court determining multiple claim/multiple party lawsuits "may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties" if there is no just reason for delay. Although the plaintiffs asked the District Court to enter final judgments as to the claims decided on September 18, 1985, the District Court exercised its discretion not to enter final judgment.

Plaintiffs' other remedy for obtaining Circuit Court jurisdiction was 28 U.S.C. §1292(b). Under this section a district judge may certify appeal of an interlocutory order "not otherwise appealable" if the order involves a disputed "question of law."

The District Court denied plaintiffs' Section 1292(b) attempt at obtaining Circuit Court jurisdiction over their appeal of the September 18, 1985 order.

In order to circumvent the problem of appealing the District Court's order despite defendant Troy's presence, the plaintiffs resorted to a Federal Rule of Civil Procedure 41(a)(1) stipulation of dismissal as to defendant Troy on September 23, 1985. By eliminating Troy as a defendant, plaintiffs contended that the District Court's

September 18, 1985 ruling was a "final decision" for appeal purposes.

When the Circuit Court panel majority addressed the question of its jurisdiction, the court noted that the plaintiffs' claims against Troy were barred by the statute of limitations as soon as the Rule 41(a)(1) stipulation became official:

> Because Fassett and Buckley retained no viable cause of action against Troy, we conclude that the dismissal, which was nominally without prejudice, was for our purposes, a final dismissal . . . it would be anomalous [sic.] to hold that a plaintiff had no right to appeal the dismissal of all but one of his claims after that one claim not initially dismissed, had thereafter been voluntarily and finally abandoned. (A-15-16)

Judge Adams' dissent conceded that plaintiffs could appeal their claims if that one claim had been "finally abandoned", but he noted that the statute of limitations was not before the Circuit Court because no one pleaded or raised that affirmative defense during the District Court proceedings or the appeals process. (A-41-42) Because the defendants never asserted the statute of limitations, Judge Adams argued that the majority was speculating as to whether the plaintiffs could ever proceed against defendant Troy in holding that the District Court rendered a "final decision":

> Until that occurs — when the plaintiffs attempt to reinstate the action against Troy, as permitted under the district court's order — it is merely speculative whether the plaintiffs will be unable to proceed. The majority's approach is simply not an instance of an appellate court assuming its duty to *decline* jurisdiction where some fact exists barring such jurisdiction; rather, the majority here attempts to assert jurisdiction where there is some possibility that

> *might exist in the future* eliminating the jurisdictional bar. (A-42)

Referring to the parties' attempt to "end run" the finality rules of 28 U.S.C. §1291, the dissent said that the majority allowed the plaintiffs "to obtain a *de facto* interlocutory appeal" even when the trial court denied the plaintiffs' attempt to certify the court's order pursuant to F.R.C.P. Rule 54(b) or 28 U.S.C. §1292(b). (A-43)

Plaintiffs' sole possibility for obtaining Circuit Court jurisdiction over their appeal is the Supreme Court's "collateral order" exception to the "final decision" rule announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). Under the *Cohen* exception, the Circuit Court of Appeals may assume jurisdiction over a non-final District Court decision if:

> it falls within that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. *Cohen v. Beneficial Industrial Loan Corp.*, supra, 337 U.S. at 546, 69 S. Ct. at 1225. *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2815. (1985)

Application of the *Cohen* test to the District Court's order of September 18, 1985 compels the conclusion that this decree was not a "collateral order".

The District Court granted summary judgment in favor of all defendants except Troy because the Court decided that the plaintiffs could not meet the burden of proving their causes of action. When the District Court made this ruling, it was determining the merits of the causes of action. Plaintiffs simply could not sustain their claims without proving that each defendant physically served alcoholic beverages at the ill-fated party. Thus,

Cohen's exception to the "final decision" requirement does not apply here because plaintiffs' appeal claims are not independent of their cause of action.

Although the Supreme Court used the *Cohen* exception in *Mitchell v. Forsyth, supra,* Justice White's opinion said that deciding the question of the Attorney General's immunity was "separate from the merits of the underlying action for purposes of the *Cohen* test." 105 S. Ct. at 2815.

Other recent Supreme Court applications of the *Cohen* "collateral order" doctrine demonstrate that the exception does not apply to the District Court's ruling on the merits of this case.

District Court pretrial rulings on motions to disqualify criminal (*Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984)) and civil (*Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981)) defense counsel were adjudged to be unappealable final decisions under 28 U.S.C. §1291. *Coopers and Lybrand v. Livesay*, 437 U.S. 481, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978), held a District Court order on class certification to be unreviewable and *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977), viewed a District Court double jeopardy ruling as an appealable order only because the order was collateral to the principal issue of guilt.

By assuming jurisdiction over the plaintiffs' appeal of the September 18, 1985 order, the Circuit Court panel majority violated the Third Circuit's own standard for reviewing non-final decisions under §1291. In *Metex Corporation v. ACS Industries, Inc.*, 748 F.2d 150, 153 (3rd Cir. 1984), the Third Circuit said that review of a District Court summary judgment ruling was permissible only if the order: (1) conclusively determined the disputed question, (2) resolved an issue separate from the merits, and (3) was unreviewable on appeal from final judgment. Two other Third Circuit decisions denied review of

a non-final order for the same reasons: *Lusardi v. Xerox Corp.*, 747 F.2d 174 (3rd Cir. 1984); *Yakowicz v. Commonwealth of Pa.*, 683 F.2d 778 (3rd Cir. 1982).

Although the plaintiffs can argue that the September 18, 1985 order conclusively determined the disputed question of social host scope of liability, the plaintiffs cannot show that the order resolved a collateral issue and will be unreviewable from final judgment. Plaintiffs cannot prove their cause of action unless they show that defendant Turgiss and the other defendants provided intoxicants to Corbin Evans. Furthermore, the District Court's order will be reviewable upon final judgment. Judge Adams' dissent addressed the inapplicability of the "collateral order" exception in a footnote. (A-40)

When the District Court refused to enter final judgment on the dismissed claims following plaintiffs' Rule 54(b) motion, the court properly exercised its discretion "in the interest of sound judicial administration." *Sears, Roebuck and Co. v. Mackey, supra.* 351 U.S. at 437, 76 S. Ct. at 900.

In *Curtiss Wright Corp. v. General Electric Co.*, 446 U.S. 1, 100 S. Ct. 1460, 64 L.Ed.2d 1 (1980), the Supreme Court explained the District Court's role in determining the appealability of individual claims in the Rule 54(b) multiple party/claim context:

> Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims. The function of the district court under the Rule 54(b) is to act as "dispatcher" . . . It is left to the *sound judicial discretion* [emphasis added] of the district court to determine the "appropriate time" when each final decision in a multiple claims action is ready for appeal . . . Consideration of

> [judicial administrative interests and the equities involved] is necessary to assure that . . . the Rule effectively preserves the . . . policy against piecemeal appeals.

If the District Court decides not to enter a final judgment on individual claims in a Rule 54(b) setting, then the Court of Appeals cannot assume jurisdiction over these claims unless the Court's conclusion was "clearly unreasonable." *Curtiss Wright Corp. v. General Electric Co., supra,* 446 U.S. at 10, 100 S. Ct. at 1466.

Plaintiffs cannot appeal the September 18, 1985 order as an interlocutory appeal pursuant to 28 U.S.C. §1292(b) because the required first step of that process is District Court certification. *Pacific Union Conference of Seventh Day Adventists v. Marshall,* 434 U.S. 1305, 98 S. Ct. 2, 54 L.Ed.2d 17 (1977).

Even if the District Court had certified its summary judgment rulings as to defendants Turgiss, Poch, Zacchea, Hoffend, and Bacha, the plaintiffs still would have had to persuade the Circuit Court that exceptional circumstances justified a departure from the basic policy of postponing appellate review until after entry of final judgment. *Coopers and Lybrand v. Livesay, supra,* 437 U.S. at 475, 98 S. Ct. at 2461.

Judging by the panel majority's decision and opinion, perhaps exceptional circumstances would not have been necessary after all.

Defendant Turgiss hereby contends that this Court should grant his writ of certiorari and reverse the Third Circuit Court of Appeals panel majority for improperly assuming jurisdiction over the plaintiffs' appeal of the District Court's September 18, 1985 order. Since the passage of the Judiciary Act of 1789, the Circuit Court of Appeals' jurisdiction has been dependent upon "final decisions" of the District Court. Plaintiffs should not be allowed to circumvent the "final decision" requirement

by use of a Rule 41(a)(1) subterfuge. If the Court of Appeals can assert jurisdiction in the above manner, Section 1291 will become a dead letter and an erroneous precedent will spawn further piecemeal litigation.

II. THE CIRCUIT COURT VIOLATED THE FEDERALISM OF ERIE V. TOMPKINS BY CREATING A NEW CAUSE OF ACTION AFTER THE PENNSYLVANIA SUPREME COURT HAD RECENTLY ADDRESSED THE RELEVANT ISSUE.

Federal courts must apply the forum state's substantive law in a diversity case. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938). Justice Harlan discussed the importance of such judicial deference in our federalist government in *Hanna v. Plumer*, 380 U.S. 460, 474, 85 S. Ct. 1136, 1146, (1967);

> "[T]he scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard."

Following the District Court's summary judgment rulings in favor of the various defendants, the Third Circuit undercut our Constitution's allocation of legislative power between state and federal governments. Instead of simply evaluating the plaintiffs' actions under present Pennsylvania law, the Third Circuit expanded the scope of social host liability and created a new cause of action. Because the Pennsylvania Supreme Court had clearly carved out a narrow social host liability cause of action in *Congini v. Portersville Valve Co.*, 470 A2d 515 (Pa. 1983), the Third Circuit violated its own federalistic principles by writing new substantive law. In *Wolk v. Saks Fifth Avenue* 728 F.2d 221, 223 (3rd Cir., 1984) the Third Circuit echoed Justice Harlan:

> "While a federal court must be sensitive to the doctrinal trends of the jurisdiction whose law it applies, it is beyond the authority of a federal court in such circumstances to create entirely new causes of action."

By creating an action which allows the plaintiffs to assert liability against individuals who "intentionally and substantially" aid minors in the consumption of intoxicants, the Third Circuit also acted well beyond the limited scope of its appellate jurisdiction. Chief Justice John Marshall defined the extent of that jurisdiction in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 175, 2 L.Ed. 60, (1803).

> "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."

According to the District Court's opinion, the present defendants could not be found liable as social hosts unless the plaintiffs established that a defendant actually furnished intoxicants to the minor who caused the accident. (B-27)

Plaintiffs' conspiracy theory had argued that the defendants conspired to buy and furnish alcoholic beverages for the fraternity party, knowing that minor guests would be driving after the party. 625 F. Supp. at 333, *supra*.

Rejecting the conspiracy theory, the District Court followed the Pennsylvania Supreme Court's opinion in *Congini v. Portersville Valve Co.*, supra. *Congini* carved out a "narrow exception to the general rule against social host liability." 625 F. Supp. at 333, (B-19). According to the Pennsylvania Supreme Court in *Congini*:

> "An actor's negligence exists in furnishing intoxicants to [minors] . . . It is the person's service which forms the basis of the cause of action." 470 A.2d at 518.

When the plaintiffs were unable to prove that defendant Turgiss and other defendants furnished intoxicants to minor Corbin Evans at the fraternity party, the District Court granted summary judgment because plaintiffs could not prove an action against these defendants. 625 F. Supp. 336-337. (B-27-28)

After beginning its opinion with a jurisdictional discussion, the Third Circuit moved up to the starting line by stating its decisional task:

> We must decide whether Pennsylvania's social host liability law is so limited in scope that Fassett and Buckley have failed to state a valid cause of action against any of the defendants in the case. The district court concluded that Pennsylvania would impose social host liability only on those individuals who served . . . alcoholic beverages to minors . . . . Because we find that this conclusion . . . is unduly restrictive, we hold that the district court erred in rendering summary judgment in favor of the defendants. (A-20)

Following this opening statement, the Third Circuit began a confusing discussion as to why authority existed for an expansion of Pennsylvania's social host cause of action.

Seeing a need to justify its usurpation of Pennsylvania's legislative and judicial power, the Circuit Court initially noted that the "various states have not been uniform in their acceptance" of social host liability. (A-21) Because states which had recognized social host liability had stressed the furnishing of alcohol as the basis of the cause of action, the Circuit Court hand-waved the law from other jurisdictions with the following comment:

> "Opinions from other jurisdictions, while of some limited value in predicting the course Pennsylvania would take, cannot form the bulwark of our analysis." (A-21)

Although the Pennsylvania Supreme Court had spoken on the issue only three years before, the Circuit Court saw the need to "predict" Pennsylvania's course on the scope of social host liability.

Just six months earlier, a Third Circuit panel which had to address both the viability and scope of Pennsylvania "intentional tort" exception to the workmen's compensation remedy said that:

> "we need not decide whether the exception remains viable. That important question of state law is of course, best decided by the Pennsylvania Supreme Court." *Wilson v. Astenhill Mfg. Co.* 791 F.2d 30 (3rd Cir., 1984).

The *Wilson* panel may have refused to analyze this tort rule because the Pennsylvania Supreme Court has never directly mentioned the intentional tort exception. In the present case, the Circuit Court panel decided to predict the Pennsylvania Supreme Court's course on the scope of the "social host" tort rule in spite of the *Congini* holding which was directly on point.

When the Third Circuit addressed the *Congini* decision a few paragraphs later, it decided to change Pennsylvania's course by deliberately shifting the focus from *furnishing intoxicants (italics added)* to *making intoxicants available (italics added)*:

> "We conclude that the Pennsylvania Supreme Court would permit intoxicated minors and third parties injured by them to *maintain a cause of action against those who have made alcohol available to the minors.*" ., *(italics added)* (A-24)

In *Congini*, the Pennsylvania Supreme Court had specifically denied a cause of action based upon a defendant's making alcohol available to minors.

> Finally, appellants have argued that the defendants breached a duty as a landowner to Mark Congini

> . . . . Appellants' injuries at most would seem to have resulted from "existent conditions upon the premises" (i.e., the availability of alcohol) as opposed to "any affirmative or active negligence on [the defendants'] part" . . . . In such a case a possessor of land is not liable to a licensee in the absence of wilful and wanton injury." *Congini*, p. 519.

Although Justice Brandeis said in *Erie R.R. v. Tompkins, supra.*, p. 364, that "under the Constitution only Pennsylvania can say what tort duties are to be imposed on Pennsylvania landowners," a divided panel of the Third Circuit has shown just what a flexible document the Constitution can be when federal courts violate its federalistic principles.

Pausing to catch its breath following the discussion of the "cases and principles forming the backdrop to this appeal," the Circuit Court framed "some basic questions about the extent of social host liability in Pennsylvania.

> "First, does *Congini* apply where it is *minors* who are serving alcohol to minors? Second, does *Congini* establish liability not only for the furnishers of alcohol, but for their accomplices? Third, if *Congini* does establish liability for accomplices, what are the limits of this accomplice liability?" (A-24)

After the Circuit Court agreed with the District Court's conclusion that *Congini's* social host liability could attach minors, the Court then said that the District Court erred by not extending liability to accomplices or conspirators under the second question because of *Congini's* ostensible approval of accomplice liability. (A-25)

Congini had noted that the Pennsylvania legislature viewed minors as being incompetent to handle alcohol. 470 A.2d at 517

Congini also mentioned that an adult who *furnished* liquor to minors would be liable as an accomplice to the same extent as the offending minor under Section 306 of the Pennsylvania Crimes Code. *Congini* then held that:

> 1) defendants were negligent in serving alcohol to the point of intoxication to minors, and 2) defendants' service of alcohol formed the basis of the cause of action. 470 A.2d at 518

Twisting the *Congini* holding in order to create a new cause of action, the Third Circuit opinion stated that Congini's cause of action against Portersville "*necessarily* relied on Portersville's status as an 'accomplice' under Section 306." (A-28)

Conveniently ignoring the reality that Portersville had to furnish liquor to minors in order to earn Section 306 liability under *Congini*, the Circuit Court suddenly claimed that the Section 306 offense was the *minor's consumption of liquor (italics added)* rather than the *adult's furnishing of liquor to the unsuspecting minor. (italics added)* (A-28)

Bursting forth from the laboratory with a new cause of action, the Third Circuit panel then characterized the consuming minor as the principal and said that anyone who had an *intention* to promote or facilitate minor alcoholic beverage consumption and who *aided, agreed or attempted to aid* minor alcoholic consumption could be held liable under *Congini*. (A-28-29)

Airily dismissing the defendants' quotation of "one particular phrase" (the *Congini* holding that "It is the person's service which forms the basis of the cause of action." *Congini*, supra, p. 518), the Third Circuit panel said that: "[t]his isolated phrase could not have been intended to approve just one basis for establishing negligence to the exclusion of other possible bases." (A-29-30)

Despite the Pennsylvania Supreme Court's clear enunciation of the "furnishing" standard in *Congini*, the Third Circuit majority panel has reversed the District Court's accurate following of the relevant state law by simply changing the social host liability offense from "furnishing liquor to minors" into "minor consumption of liquor." Although the Pennsylvania Supreme Court or

State Assembly may decide to massively expand social host liability in that manner, no Pennsylvania authority presently exists for this panel majority's abuse of federal judicial power.

Judge Adams dissented from the majority panel's ruling on jurisdictional grounds, but his opinion in *Jones and Laughlin Steel v. Johns-Manville Sales*, 626 F.2d 280, 285 (3d Cir. 1980), indicates that he probably would have dissented on substantive issues here:

> "In those few instances in which the highest state court has recently addressed the precise question at issue in the occurrent action, the application of state law is readily achieved."

Perhaps nothing indicates this Circuit Court's panel's inability to "readily achieve the application of state law" than its use of a state trial court's preliminary objection ruling to buttress the present misreading of state law. (A-30) Throughout the Circuit Court majority opinion no mention is made of any other authorities which serve as data for predicting the course of the Pennsylvania Supreme Court.

Even had the Pennsylvania Supreme Court not addressed the social host liability issue in *Congini*, the majority's opinion does not stand up to minimal scrutiny under present federal court doctrine:

> In vicariously creating state law . . . the federal court may consider all available legal sources, including the Restatements of Law, treatises, law review commentaries, decisions from other jurisdictions whose doctrinal approach is substantially the same, and "the majority rule." The federal court must keep in mind, however, that its function is not to choose the rule that it would adopt for itself; it must choose the rule that it believes the state's

highest court . . . is likely to adopt in the future. Wright and Miller, *Federal Practice*, §4507, p. 100-03.

The Circuit Court majority's decision to "choose the rule that it would adopt for itself" rather than the rule that the Pennsylvania Supreme Court has already chosen or may choose is a violation of the holdings in *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 87 S. Ct. 1776, 18 L.Ed.2d 886 (1967); *Erie v. Tompkins*, supra, 304 U.S. at 78, 58 S. Ct. at 822; and *McGowan v. University of Scranton*, 759 F.2d 287, 291 (3d Cir. 1985).

After the Third Circuit majority panel created a cause of action against "those who aid minors in their consumption of intoxicants," (A-31), the court faced the problem of defining the extent of liability for this new action.

Recognizing that the Section 306 criminal statute was created for criminal conduct, the panel majority decided to insert Restatement (Second) Torts Section 876 into the second part of the new cause of action ("aided, agreed or attempted to aid") which the court created for minor consumption of alcohol. Relevant portions of Section 876 are set forth below:

RESTATEMENT (SECOND) TORTS §876 provides: Persons Acting in Concert

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct,

separately considered, constitutes a breach of duty to the third person.

Because criminal Section 306 does not contain the "substantial assistance" requirement contained in Section 876 of the Restatement (Second) Torts, the panel majority realized that it had to offer a standard which would allow a factfinder to determine "substantial assistance."

By delineating a "substantial assistance" standard the panel majority felt that it would "bridge the gap" between Pennsylvania's criminal accomplice statute and Section 876's civil accomplice liability standard.

The panel majority seized upon the D.C. Circuit's analysis of "substantial assistance" in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). Unfortunately, the panel did not quote the *Halberstam* opinion accurately.

Carefully focusing on the aiding/abetting issues of what constitutes knowing substantial assistance and to what extent is an aider/abettor liable for injuries which the principal tortfeasor causes, the *Halberstam* opinion looked to Section 876 and noted the five factors for determining "substantial aid." 705 F.2d at 483. These five enunicated factors are: nature of the act encouraged; the amount and kind of assistance given; the time of the tort; the defendant's relation to the tortfeasor; and the defendant's state of mind.

Additionally, the D.C. Circuit added a sixth factor to be used in determining "what constitutes knowing substantial assistance?". This sixth factor was the duration of assistance provided:

> "The length of time an alleged aider-abettor has been involved with a tortfeasor almost certainly affects the quality and extent of their relationship and probably influences amount of aid provided as well; additionally it may afford evidence of the defendant's state of mind." *Halberstam v. Welch* 705 F.2d at 484.

After answering the first question regarding "substantial assistance", the D.C. Circuit panel then addressed extent of liability by saying that a person who assists a tortious act may be liable for other reasonably forseeable acts done in connection with [the act]." 705 F.2d at 484.

Ignoring the *Halberstam* opinion's emphasis on the "duration of assistance" factor, the Third Circuit panel listed Section 876's five factors and then added "forseeability of the harm that occurred" as its sixth factor. (A-34) This inclusion of forseeability as a factor meant that the panel majority did not consider the D.C. Circuit's separation of "substantial assistance" from the extent of liability to be important. Oddly enough, the Third Circuit panel opinion had said that once "substantial assistance" is determined:

> "we will have given definition to the extent and limits of civil accomplice liability in a social host cause of action". (A-32)

Apparently, the panel did not consider the extent of liability question to be worthy of an explanation.

The Third Circuit's misinterpretation of the *Halberstam* opinion dramatizes the dangers that a federal court encounters when it ignores established state law and attempts to jerry-build substantive law.

If the Third Circuit panel was not sure what the Pennsylvania Supreme Court would do in the same situation, then perhaps the panel could have certified social host liability questions to the Pennsylvania Supreme Court. Although Pennsylvania's Appellate Rules do not include the certification remedy which other states offer, would the Pennsylvania Supreme Court have turned down a certification request which merely followed the spirit of *Erie v. Tompkins*?

Defendant Bruce Turgiss hereby asks the Supreme Court to reinstate the District Court's ruling of summary judgment in his favor based upon the District Court's

correct interpretation of Pennsylvania's social host cause of action.

In the alternative, defendant Bruce Turgiss asks the Supreme Court to direct the Third Circuit Court of Appeals to certify questions regarding the scope of Pennsylvania's social host action to the Pennsylvania Supreme Court.

CONCLUSION

For the above reasons, defendant hereby requests this Court to grant his writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1652

FASSETT, ANNE

v.

DELTA KAPPA EPSILON (NEW YORK)
THE VILLANOVA CHAPTER OF
DELTA KAPPA EPSILON
POCH, CHRISTOPHER
BACHA, MICHAEL
TROY, CHRISTOPHER L.
TURGIS, BRUCE E. AND
ZACHEA, KEVIN

THE VILLANOVA CHAPTER OF
DELTA KAPPA EPSILON

v.

EVANS, CORBIN S.
DALLESANDRO, NICHOLAS
BACHA, JR., MICHAEL

THE VILLANOVA CHAPTER OF DELTA KAPPA EPSILON, AND ITS INDIVIDUAL MEMBERS AS OF SEPTEMBER 25, 1982: BRUCE BALTERA, EUGENE CAMPOSANO, LOUIS D'ONOFRIO, WILLIAM J. FUREY, PETER JIRAK, DAVID R. JONES, RICHARD J. KEATING, BOB MAYER, GLENN P. MAYKISH, MICKY MCCLURE, KEN MURPHY, WILLIAM SCOTT O'NEIL, MICHAEL F. O'SULLIVAN, ANTHONY D. PACARO, CHRISTOPHER F. POCH, STEPHEN T. SCHMIDT, CHRISTOPHER L. TROY, BRUCE E. TURGISS, TIMOTHY F. VALLACE, PAUL

VANDEVENTER, CHRISTOPHER J. WACKERMAN, PETER J. WYNNE, KEVIN C. ZACCHEA

TROY, CHRISTOPHER L.

v.

EVANS, CORBIN S. AND D'ALLENSANDRO, NICHOLAS

Anne Fassett,

Appellant

No. 85-1653

BUCKLEY, JOHN L., JR., Administrator of the Estate of BUCKLEY, MONICA T., Deceased

v.

POCH, CHRISTOPHER F., TROY, CHRISTOPHER L., TURGISS, BRUCE, ZACCHEA, KEVIN, HOFFEND, DANIEL, DELTA KAPPA EPSILON DOUGHERY HALL, DELTA KAPPA EPSILON OF NEW YORK

v.

THE VILLANOVA CHAPTER OF DELTA KAPPA EPSILON, AND ITS INDIVIDUAL MEMBERS AS OF SEPTEMBER 25, 1982: BRUCE BALTERA, EUGENE CAMPOSANO, LOUIS D'ONOFRIO, WILLIAM J. FUREY, DANIEL J. HOFFEND, PETER JIRAK, RICHARD J. KEATING, BOB MAYER, GLENN P.

MAYKISH, MICKY MCCLURE, KEN MURPHY,
WILLIAM SCOTT O'NEIL, MICHAEL F. O'SULLIVAN,
ANTHONY D. PACARO, CHRISTOPHER F. POCH,
STEPHEN T. SCHMIDT, BRUCE E. TURGIS,
TIMOTHY F. VALLACE, PAUL VANDEVENTER,
CHRISTOPHER J. WACKERMAN, PETER J. WYNNE,
KEVIN C. ZACCHEA

POCH, CHRISTOPHER F.
TROY, CHRISTOPHER L.

v.

EVANS, CORBIN S., D'ALLENSANDRO,
NICHOLAS and WYNNE, PETER J.

John L. Buckley,
Administrator of the
Estate of Monica T.
Buckley, Deceased,

Appellant

No. 86-1102

FASSETT, ANNE

v.

DELTA KAPPA EPSILON (NEW YORK)
THE VILLANOVA CHAPTER OF
DELTA KAPPA EPSILON
POCH, CHRISTOPHER
BACHA, MICHAEL
TROY, CHRISTOPHER L.
TURGIS, BRUCE E. AND
ZACHEA, KEVIN

THE VILLANOVA CHAPTER OF
DELTA KAPPA EPSILON

v.

EVANS, CORBIN S.
DALLESANDRO, NICHOLAS
BACHA, JR., MICHAEL
HOFFEND, DANIEL

THE VILLANOVA CHAPTER OF DELTA KAPPA EPSILON, AND ITS INDIVIDUAL MEMBERS AS OF SEPTEMBER 25, 1982: ROBERT J. ACKERMAN, BRUCE BALTERA, THOMAS C. BROCKWELL, EUGENE CAMPOSANO, KEVIN CONNOR, JOSEPH F. DELANEY, LOUIS D'ONOFRIO, RICHARD J. DULCEY, DANIEL M. FARRELL, SEAN P. FLANAGAN, WILLIAM J. FUREY, PAUL A. GENTILE, DANIEL J. HOFFEND, PETER JIRAK, DAVID R. JONES, RICHARD J. KEATING, ATTILA A. KOC, BOB MAYER, GLENN P. MAYKISH, MICKY MCCLURE, STEVEN M. MCEVOY, JOHN J. MCGEE, THOMAS M. MULROY, KEN MURPHY, RONALD A. NAUMAN, WILLIAM SCOTT O'NEIL, MICHAEL F. O'SULLIVAN, ANTHONY D. PACARO, CHRISTOPHER F. POCH, HENRY ROHRER, STEPHEN T. SCHMIDT, JOSEPH A. TORRISI, CHRISTOPHER L. TROY, BRUCE E. TURGISS, TIMOTHY F. VALLACE, PAUL VANDEVENTER, CHRISTOPHER J. WACKERMAN, JAMES T. WILSON, PETER J. WYNNE, KEVIN C. ZACCHEA

TROY, CHRISTOPHER L.

v.

EVANS, CORBIN S. AND
D'ALLENSANDRO, NICHOLAS

Bruce Turgiss,

Appellant

No. 86-1103

BUCKLEY, JOHN L., JR., Administrator of
the Estate of BUCKLEY, MONICA T., Deceased

v.

POCH, CHRISTOPHER F.,
TROY, CHRISTOPHER L.
TURGISS, BRUCE,
ZACCHEA, KEVIN,
BACHA, MICHAEL, JR.,
HOFFEND, DANIEL,
DELTA KAPPA EPSILON DOUGHERY HALL,
DELTA KAPPA EPSILON OF NEW YORK

v.

THE VILLANOVA CHAPTER OF DELTA KAPPA EPSILON, AND ITS INDIVIDUAL MEMBERS AS OF SEPTEMBER 25, 1982: ROBERT J. ACKERMAN, BRUCE BALTERA, THOMAS C. BROCKWELL, EUGENE CAMPOSANO, KEVIN CONNOR, JOSEPH F. DELANEY, LOUIS D'ONOFRIO, RICHARD J. DULCEY, DANIEL M. FARRELL, SEAN P. FLANAGAN, WILLIAM J. FUREY, PAUL A. GENTILE, DANIEL J. HOFFEND, PETER JIRAK, DAVID R. JONES, RICHARD J. KEATING, ATTILA A. KOC, BOB MAYER, GLENN P. MAYKISH, MICKY MCCLURE, STEVEN M. MCEVOY, JOHN J. MCGEE, THOMAS M. MULROY, KEN MURPHY, RONALD A. NAUMAN, WILLIAM SCOTT O'NEIL, MICHAEL F. O'SULLIVAN, ANTHONY D. PACARO, CHRISTOPHER F. POCH, HENRY ROHRER, STEPHEN T. SCHMIDT, JOSEPH A. TORRISI, BRUCE E. TURGIS, TIMOTHY F. VALLACE, PAUL VANDEVENTER, CHRISTOPHER J. WACKERMAN, JAMES T. WILSON, PETER J. WYNNE, KEVIN C. ZACCHEA

POCH, CHRISTOPHER F.

TROY, CHRISTOPHER L.

v.

EVANS, CORBIN S., D'ALLENSANDRO, NICHOLAS and WYNNE, PETER J.

Bruce Turgiss,

Appellant

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Nos. 84-4613, 84-4624)

Argued September 15, 1986

BEFORE: ADAMS, STAPLETON, and GARTH
Circuit Judges

(Opinion filed December 5, 1986)

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OPINION OF THE COURT

GARTH, *Circuit Judge*:

The four cases before this court arise out of a tragic accident whose fact pattern is disturbingly common. In the early morning hours of Sunday, September 26, 1982, seventeen year old Anne Fassett, nineteen year old Monica Buckley and eighteen year old Corbin Evans were involved in a traffic accident when Evans, while driving his car, collided with a pickup truck operated by Nicholas D'Allessandro. Evans, Fassett, and Buckley had just left a fraternity sponsored party where Evans had allegedly consumed an indeterminate quantity of alcohol. Monica Buckley was killed in the accident, and Anne Fassett was rendered a quadriplegic.

Anne Fassett brought a diversity action in the Federal District Court for the Eastern District of Pennsylvania against Christopher Poch, Bruce Turgiss, Kevin Zacchea, Christopher Troy and Michael Bacha. John Buckley, Jr., the administrator of the estate of Monica Buckley, brought a similar suit against defendants Poch, Turgiss, Zacchea, Troy and Daniel Hoffend.[1] The two cases (before this court as

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1. Delta Kappa Epsilon of New York and the Villanova Chapter of Delta Kappa Epsilon were additional first party defendants in the original suits. However, only the above-mentioned first party defendants remained in the suit at any time relevant to this appeal.

appeals 85-1652 and 85-1653) were consolidated for purposes of trial before the Honorable Louis C. Bechtle. Fassett and Buckley sought to hold the named defendants liable for the injuries they suffered under Pennsylvania tort law.

The named defendants filed a series of cross claims against each other, and they also impleaded a number of third party defendants. Corbin Evans and Nicholas D'Allessandro, the drivers of the two vehicles, were joined as third party defendants in both actions.

In the Fassett action, Daniel Hoffend was joined as a third party defendant, and defendant Michael Bacha impleaded individual members of the Villanova Delta Kappa Epsilon fraternity.

Similarly, in the Buckley action, Christopher Troy impleaded Michael Bacha and numerous individual members of the Villanova Delta Kappa Epsilon fraternity.

Many of these first and third party defendants filed motions for summary judgment. The district court directed Fassett and Buckley (as well as any defendants who raised claims against third parties) to submit written "offers of proof" to explain the basis of their theory of liability against each of the defendants. These offers of proof were designed to assist the court in ruling on the summary judgment motions. Appendix at 80. After the written offers of proof were submitted, the court held a hearing at which it allowed these offers of proof to be supplemented orally.

The offers of proof alleged that Evans had been drinking while in the apartment leased by defendants Michael Bacha, Kevin Zacchea, Christopher Troy, and Bruce Turgiss, and that these four defendants had agreed to allow their apartment to be used as the site for a fraternity party where alcohol would be served to approximately 200 minors. More specifically, it was alleged that Troy was an organizer of the party and that

he served as one of the bartenders. It was alleged that Turgiss was a "passive organizer" of the party and that he had worked the door.[2] It was alleged that Bacha, who was not a member of the Villanova Delta Kappa Epsilon fraternity, nevertheless acted in concert with his fellow roommates and invited the fraternity to use his apartment for a party during which intoxicants were served to minors.

It was alleged that Poch was the president of the fraternity and an organizer of the party. Additionally, it was alleged that he was one of the people who drove into Maryland to purchase alcohol for the party. Although Hoffend was not at the party, it was alleged that he was the treasurer of the fraternity and that he wrote a blank check to be used for the purchase of the alcohol consumed at the party.[3]

The district court concluded that, as a matter of Pennsylvania law, a defendant would have had to have

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2. Deposition testimony that was not before the district court would have established that Turgiss also worked as a bartender. See discussion *infra*, Part IV.

3. There were offers of proof submitted against the third party defendants as well. It was alleged that Evans attended the fraternity sponsored party and that, after becoming intoxicated, he drove the car in which Buckley and Fassett rode when they were injured.

Although D'Allessandro did not attend the fraternity party, it was alleged that he was the driver of the pickup truck that Evans collided with. He was charged with general negligence. As to the remaining members of the Villanova Chapter of Delta Kappa Epsilon, it was variously alleged against them that they either supplied alcohol for the party, planned the party, or merely attended the party.

We note that the district court opinion recites that, in an action brought against Evans and D'Alessandro in the Philadelphia Court of Common Pleas, D'Alessandro had been voluntarily dismissed, and a verdict against Evans was entered in the amount of approximately $5,100,000. Fassett v. Poch, 625 F. Supp. 325, 327 (E.D. Pa. 1985).

physically served (i.e. directly handed) an alcoholic beverage to Evans in order to be civilly liable. Therefore, as to each individual defendant, unless it was specifically alleged that he had acted as a bartender or otherwise served alcohol to guests on the night in question, the court on September 18, 1985 granted summary judgment in his favor.[4]

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4. In the Buckley action, summary judgment was entered in favor of:

(i) named defendants Poch, Zacchea, Turgiss and Hoffend; and

(ii) third party defendant Bacha and thirty-four additional Villanova Delta Kappa Epsilon members.

Summary judgment was denied as to:

(i) named defendant Troy; and

(ii) third party defendants Corbin Evans and Peter Wynne.

This left Troy as an original defendant and Evans, D'Alessandro, and Wynne as the only remaining third party defendants in the Buckley suit.

In the Fassett action, summary judgment was entered in favor of:

(i) named defendants Poch, Zacchea and Bacha; and

(ii) third party defendant Hoffend.

Dismissal of the complaint was granted in favor of:

(i) Turgiss.

Summary judgment was denied as to:

(i) named defendant Troy; and

(ii) third party defendant Evans.

Additionally, all of the third party claims raised by Bacha were dismissed as moot. This left Troy as an original defendant and Evans and D'Alessandro as third party defendants in the Fassett suit.

Troy was the only remaining first party defendant in both cases. Rather than proceed to trial against Troy alone, Fassett and Buckley, pursuant to Fed. R. Civ. P. 41(a)(1), filed a stipulation of dismissal without prejudice against Troy. Because Troy was the sole remaining first party defendant, Fassett and Buckley assumed that this action would dispose of all outstanding claims (against both Troy and the third party defendants he had named) and thereby render the district court's earlier order final for purposes of appeal.

Fassett filed a timely notice of appeal from the district court's order of September 18, 1985, which had granted summary judgment in favor of Poch, Bacha and Zacchea, and which had dismissed the complaint against Turgiss. On the same day, Buckley also filed her notice of appeal, in which she stated that she was appealing the order granting summary judgment to all of the first party defendants in her suit and the order "granting summary judgment in favor of Michael Bacha, dismissing the third party complaint as to all of the remaining third party defendants. . ." Appendix at 575.

It is apparently on the basis of this latter statement in Buckley's notice of appeal that the third party defendants were originally considered to be parties to this appeal. The vast majority of the third party defendants filed motions for dismissal with this court. These motions were granted by a motions panel of this court "without prejudice to defendants' rights to reinstate third party complaints in the event the district court's orders are reversed."[5] Because the appeals against the third party defendants were

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5. Because of the disposition which we reach in this case, on remand it will be for the district court in the first instance to determine the respective rights of the parties.

dismissed, we did not consider any briefs which had previously been filed by them. As a consequence, no third party defendants appeared at oral argument of these appeals.

After the record was complete for purposes of appeal, Fassett and Buckley filed a joint motion, pursuant to Fed. R. App. P. 10(e), to augment the record on appeal with, *inter alia*, certain portions of the deposition testimony of one Christopher Wackerman. Wackerman testified that, on the night in question, he had seen defendant Bruce Turgiss serving alcohol to party guests. This deposition was not filed of record at the time the district court rendered its final judgment.

By order dated January 14, 1986, the district court granted the motion to augment the record. Consolidated appeals numbered 86-1102 and 86-1103 raise Bruce Turgiss' separate claim against Fassett and Buckley, that the district court erred in ordering this augmentation of the record on appeal with material that was not before the district court when its final decision was rendered.

I.

Before considering the arguments raised by Fassett and Buckley, we address *sua sponte* our jurisdiction. Although the parties have not briefed the issue, we cannot ignore matters that bring into question the existence of federal jurisdiction. *Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398 (1979). Therefore, we must determine whether Fassett and Buckley's voluntary dismissal of the claims against the remaining original defendant Troy, left plaintiffs with a final appealable order.

Judge Bechtle's order entered September 18, 1985 (granting judgment in favor of all first party defendants

except Troy) was not a final order when entered. The order became final, however, when on September 23, 1985, the complaints against Troy were dismissed. This dismissal left no outstanding issues or parties before the district court. Therefore, the notices of appeal, filed on October 15, 1985 were timely and effective notices of appeal from the September 18th order which had become final.

The dissent raises the possibility that the dismissal of the complaint against Troy, which was styled as being "without prejudice," may not have effectively and finally disposed of all parties. We cannot agree.

In the present case, although all parties had stipulated to a dismissal without prejudice against Troy, the two-year Pennsylvania statute of limitations had already run *as of the time of Troy's dismissal*. The automobile accident occurred on September 26, 1982, and the two-year statutory period for filing the claim had run as of September 26, 1984. *See* 42 Pa. Cons. Stat. Ann. § 5524(2) & (7). Therefore, when Fassett and Buckley dismissed their causes of action against Troy, on September 23, 1985, their actions against Troy were effectively barred. Because Fassett and Buckley retained no viable cause of action against Troy, we conclude that the dismissal, which was nominally without prejudice, was for our purposes, a final dismissal. *See Carr v. Greene*, 516 F.2d 502 (5th Cir. 1975) (holding that the running of the statute of limitations made a "without prejudice" dismissal final for purposes of 28 U.S.C. § 1291).

Although this court has, in dictum, expressed displeasure over what it terms "indirect attempts" at avoiding the finality rule, *see, e.g., Sullivan v. Pacific Indemnity Co.*, 566 F.2d 444, 445 (3d Cir. 1977), we do not believe that, under the circumstances outlined above, this case presents such a problem. Certainly, we

will not permit an indirect review of interlocutory rulings that may not be subject to direct review. But it would be anomolous to hold that a plaintiff had no right to appeal the dismissal of all but one of his claims after that one claim not initially dismissed, had thereafter been voluntarily and finally abandoned.[6]

As Judge Wallace, writing for the court in *Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 681 (9th Cir. 1980), stated, after citing numerous authorities which hold to the same effect as we hold here, "These cases provide clear examples of giving a practical rather than a technical construction to the finality rule, without sacrificing the considerations underlying that rule. There is no danger of piecemeal appeal confronting us if we find jurisdiction here, for nothing else remains in the federal courts."

The dissent argues, however, that the order was not final because a statute of limitations defense must be affirmatively pleaded.[7] We find this argument

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6. In reaching this conclusion, we find Sullivan v. Pacific Indemnity Co., 566 F.2d 444 (3d Cir. 1977), to be inapposite. In *Sullivan*, the district court had denied a motion for class certification. In an attempt to appeal that order, the plaintiffs refused to further prosecute their case. After the district court granted a Fed. R. Civ. P. 41(b) dismissal, the plaintiffs appealed the denial of class certification. This court held that despite the subsequent dismissal, there was no final appealable order.

The reasoning in *Sullivan*, however, is heavily dependent upon this court's clearly articulated policy against allowing interlocutory appeals of class certification decisions, *see, e.g.* Gardner v. Westinghouse Broadcasting Co., 559 F.2d 209 (3d Cir. 1977), *aff'd*, 437 U.S. 478 (1978); Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976); Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972), and we decline to extend its holding beyond the class certification context.

7. We do not understand the dissent's argument that because the statute of limitations was not pleaded or raised in the district

unpersuasive. We assume that Troy would fail to plead a statute of limitations defense only if he were unaware of its availability. We believe that the mere theoretical possibility that Fassett and Buckley will reinstate an untimely cause of action in a federal forum, and that Troy would fail to plead a statute of limitations defense if so named, is so unrealistic in the posture of the present case, that it cannot operate to divest this court of appellate jurisdiction.

Indeed, even if we were to accept the reasoning of the dissent, which we do not, that a dismissal without prejudice of a claim that could never have been timely refiled is not a final disposition of that claim, we would still hold that we are vested with jurisdiction in this case.

In *Cape May Greene, Inc. v. Warren*, 698 F.2d 179 (3d Cir. 1983), this court held that, except in a few very specific situations,[8] a notice of appeal from a non-final order will take effect when, due to subsequent events, the previous non-final order is rendered final. Even assuming arguendo, that the dismissal without prejudice on September 23, 1985, was not itself sufficient to render the September 18th order final, the representations of counsel made during oral argument were more than sufficient to constitute a "subsequent event" which rendered the September 18th order a final one.

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court, the issue is not properly before us. The issue could not have been pleaded or raised in the district court because the bar of the statute of limitations did not attach until after the complaint was dismissed as to Troy. Additionally, the issue was not briefed before us because the question of appellate jurisdiction was raised by the court *sua sponte*.

8. Fed. R. App. P. 4(a)(4) lists those situations in which a premature notice of appeal "self destructs." In Cape May Greene, Inc. v. Warren, 698 F.2d 179, 185 (3d Cir. 1983), this court held that it would limit the self destruction of premature notices of appeal to those situations specified in Rule 4(a)(4).

At oral argument, counsel for Fassett and Buckley informed us that they had a pending action in state court against Troy. They dismissed their federal claim against Troy without prejudice in order to prevent Troy from pleading an effective res judicata defense to the action in state court, not to reinstitute the federal suit against him. Counsel for Fassett and Buckley conceded that any rights they once had against Troy could not be reasserted in a federal forum because of the statute of limitations bar, and indeed they represented that they had no intention of reinstating any such federal action.

The dissent focuses on that portion of the oral argument where we explored the matters leading up to the dismissal of Troy without prejudice. However, the colloquy that took place at oral argument was far more extensive than that to which the dissent refers. Taken in full context, the tapes of oral argument reveal that:

(1) originally certification for an interlocutory appeal was sought from the district court but was denied;

(2) Troy was dismissed without prejudice because there was concern that an immediate "with prejudice" dismissal might affect the pending state action;

(3) the statute of limitations had run prior to Troy's dismissal;

(4) the action could not be reinstated against Troy because of the bar of the statute;

(5) if we were to dismiss the appeal, Fassett and Buckley would dismiss against Troy with prejudice; and

(6) as a pragmatic matter, no action in any event would have been brought against Troy because of the trial expense involved and the

> limited insurance under which Troy was covered.

Thus, taken in full context, there was no question but that Fassett and Buckley were "standing upon" Troy's dismissal. *See Borelli v. City of Reading*, 532 F.2d 950, 951-52 (3d Cir. 1976) (an order which dismisses a complaint without prejudice is final and appealable if plaintiff declares his intention to take no further action). By standing upon Troy's dismissal, no doubt remained as to the finality of the September 18th order.

Therefore, even if the entry of a dismissal without prejudice after the statute of limitations had already expired was not itself sufficient to render the September 18th order a final one, that order would have become final when counsel renounced their claims against Troy. Under Fed. R. App. P. 4(a)(2) and the *Cape May Greene* reasoning, the "premature" notices of appeal filed on October 15, 1985 would have become effective upon the final abandonment of the claims against Troy, and appellate jurisdiction would then have vested in this court.

We are satisfied that under the circumstances present here, we have jurisdiction. Were we to hold otherwise, the very substantial claims of the plaintiffs would be immunized from judicial review forever.

II.

A federal district court sitting pursuant to diversity jurisdiction must apply the choice of law rules of the state in which it is located. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1942). The district court concluded that Pennsylvania has the most significant contacts with the events giving rise to this lawsuit, 625 F. Supp. at 330 n.8, and this holding is unchallenged on appeal. We therefore look to Pennsylvania state law

in answering all substantive questions. *Erie v. Tompkins*, 304 U.S. 64 (1938)

The standard of appellate review for a district court's award of summary judgment is well settled: we apply the same test that the district court should have utilized initially. As to factual matters, all inferences to be drawn must be viewed in the light most favorable to the appellant. We have plenary review over the district court's conclusions regarding the applicable Pennsylvania law. To sustain a grant of summary judgment we must conclude that no genuine issue as to any material fact remains for trial, and appellees are entitled to judgment as a matter of law. *Gans v. Mundy*, 762 F.2d 338, 340 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 537 (1986).

The major question before us is a legal one which in turn gives rise to disputed factual issues. We must decide whether Pennsylvania's social host liability law is so limited in scope that Fassett and Buckley have failed to state a valid cause of action against any of the defendants in this case. The district court concluded that Pennsylvania would impose social host liability only on those individuals who served, i.e. physically handed, alcoholic beverages to minors. 625 F. Supp. at 336. Because we find that this conclusion as to the scope of Pennsylvania social host liability law is unduly restrictive, we hold that the district court erred in rendering summary judgment in favor of the defendants.

III.

Social host liability for the actions of intoxicated guests is a relatively new phenomenon. Although some commentators have noted a trend toward the expansion of social host liability, *see, e.g.*, Note, *Social Host Liability for Guests Who Drink and Drive: A Closer Look at the Benefits and the Burdens*, 27 Wm.

& Mary L. Rev. 583 (1986), the various states have not been uniform in their acceptance of this new legal concept. Because we must apply the law of Pennsylvania, opinions from other jurisdictions, while of some limited value in predicting the course Pennsylvania would take, cannot form the bulwark of our analysis. Our decision rests on a close examination of the three Pennsylvania Supreme Court precedents that deal with the question of social host liability: *Manning v. Andy*, 310 A.2d 75 (1973), *Klein v. Raysinger*, 470 A.2d 507 (1983) and *Congini v. Portersville Valve Co.*, 470 A.2d 515 (1983).

Manning v. Andy was the first Pennsylvania Supreme Court case to consider imposing civil liability on a social host for the tortious conduct of a person he had served. *Manning* involved an employer who, according to the complaint, served alcohol at a social function to a visibly intoxicated employee. The employee was involved in an automobile accident, and a passenger of the employee sued the employer. The Pennsylvania Supreme Court declined to impose civil liability on the employer as a non-licensed person (as distinguished from licensed proprietors of bars) who furnished intoxicants to others for no remuneration, stating that such a decision was "best left to the legislature." 310 A.2d at 76.

In a concurring opinion, Justice Pomeroy expressed the view that the passenger's complaint did not state a cause of action because the complaint was couched in terms of a violation of the State Liquor Code, which is primarily concerned with regulating the actions of licensees. He went on to argue, however, that a cause of action *could* be stated under ordinary tort law, and such a cause of action could result in liability for a person who "serves liquor to one whom he knows or should know to be intoxicated, and who he knows or should know is about to drive an automobile or engage

in some other activity involving the potentiality of harm to himself or to others, with resulting damage." 310 A.2d at 77.

Manning remained the controlling precedent in Pennsylvania for ten years, until the companion cases of *Klein v. Raysinger* and *Congini v. Portersville Valve Co.* were decided in 1983. *Klein* specifically limited the *Manning* holding:

> In *Manning* we held only that Section 493(1) of the Liquor Code, 47 P.S. 4-493(1), did not create a cause of action against non-licensed persons who furnish intoxicants for no renumeration [sic]. We did not decide the issue of whether a non-licensed host could be subject to a cause of action in negligence.

470 A.2d at 508 n.6. By so distinguishing *Manning*, the Court concluded that it was faced with a question of first impression as to whether to recognize a cause of action in negligence against a social host who served alcohol to a visibly intoxicated person, when the host knows or should know that the guest intends to drive a motor vehicle.

Klein v. Raysinger involved a couple (the Kleins) who had been injured in an automobile accident. Raysinger, the driver of the automobile with which they collided, was allegedly intoxicated. As part of their action, the Kleins brought suit against the Gilligan Family. The Gilligans were non-licensees (i.e. social hosts) who were charged with negligence in serving intoxicants to Raysinger, their adult guest. The court concluded that it *would not* impose social host liability where an *adult* guest had been served intoxicants. "[T]he great weight of authority supports the view that in the case of an ordinary able bodied man it is the *consumption* of alcohol, rather than the *furnishing* of the alcohol, which is the proximate cause of any

subsequent occurrence." 470 A.2d at 510 (emphasis added).

In the companion case of *Congini v. Portersville Valve Co.*, however, the Court found that a cause of action in negligence did lie against a corporate defendant that had sponsored a party at which a *minor* guest had become intoxicated. In *Congini*, the plaintiff, Mark Congini was, at the time of the accident, an eighteen year old[9] employee of defendant Portersville Valve Company (Portersville). Congini attended a company sponsored Christmas party at the Portersville plant. Alcohol was available at the party, and Congini consumed an undisclosed amount of alcohol before departing. While driving home from the party, Congini became involved in a traffic accident that left him totally and permanently disabled.[10] 470 A.2d at 516. The Pennsylvania Supreme Court, in reversing the lower court's judgment in favor of Portersville, held that the *Congini* facts constituted negligence *per se* for the purpose of establishing civil liability under Pennsylvania tort law.

Thus we can conclude from the Pennsylvania cases which have dealt with this subject, that whereas *adult* guests and those third parties whom they have injured

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9. The legal drinking age in Pennsylvania is now, and was at the time of *Congini*, twenty-one. 46 Pa. Stat. Ann. § 601(65), 47 Pa. Stat. Ann. § 4-493(1) & (14).

10. Although the specific fact situation faced in *Congini* involved a minor seeking recovery for the results of his own intoxication, the defendants here do not contend that the *Congini* rationale is inapposite for a case involving a third party plaintiff. *Congini* treats third party recovery as an *a fortiori* case. 470 A.2d at 518 ("we see no valid distinction which would warrant a limitation on the action to third parties alone"), and this "extension" of *Congini* has been recognized and applied without comment in the decisions of the Pennsylvania appellate courts. *See, e.g.* Douglas v. Schwenk, 479 A.2d 608 (Pa. Super. 1984).

have no cause of action against their social (non-licensed) host, *minors* who are served liquor and who in turn injure others are regarded and treated differently. As we construe these cases, we conclude that the Pennsylvania Supreme Court would permit intoxicated minors and third parties injured by them to maintain a cause of action against those who have made alcohol available to the minors.

With these cases and principles forming the backdrop to this appeal, we are called upon to decide some basic questions about the extent of social host liability in Pennsylvania. First, does *Congini* apply where it is *minors* who are serving alcohol to minors? Second, does *Congini* establish liability not only for the furnishers of alcohol, but also for their accomplices? Third, if *Congini* does establish liability for accomplices, what are the limits of this accomplice liability?

A.

The district court concluded that Pennsylvania would recognize social host liability against minors who served intoxicants to minors, and we agree. In its discussion concerning minors (*Congini*, 470 A.2d at 518), the *Congini* court cites with approval the standards for negligence it adopted in *Kuhns v. Brugger*, 135 A.2d 395, 401 (1957). These standards place minors into three categories based on their ages:

> [M]inors under the age of seven years are conclusively presumed incapable of negligence; *minors over the age of fourteen years are presumptively capable of negligence, the burden being placed on such minors to prove their incapacity*; minors between the ages of seven and fourteen years are presumed incapable of negligence, but such presumption is rebuttable

> and grows weaker with each year until the fourteenth year is reached.

135 A.2d at 401 (emphasis added). We are confident, as was the district court, that Pennsylvania would use the *Kuhns v. Brugger* standards and find that the minor defendants in this case, all of whom were above fourteen years of age at the time of the party, were presumptively capable of negligence, and therefore were whether the actions of Congini, as a minor who consumed alcohol, potentially liable as social hosts.[11] We therefore conclude that *Congini* does apply to those circumstances in which *minors* serve alcohol to minors.

B.

The district court concluded that Pennsylvania would not extend civil liability under the social host doctrine to cover civil conspirators or accomplices. 625 F.Supp. at 333-34. We hold that the district court erred in this conclusion. Accomplice liability was not only approved in *Congini*, it served as a necessary basis for holding the defendant Portersville liable in that case.

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11. The only Pennsylvania case brought to our attention that limits *Congini* to adult servers, is Lattanzi v. Tori, No. 00737 (Pa. Super. Feb. 21, 1985). *Lattanzi* is an unpublished *per curiam* memorandum decision. We note that under the internal operating procedures of the Pennsylvania Superior Court, a *per curiam* order supported by a memorandum opinion "shall not be published and may not be cited as precedent in any brief, argument or subsequent opinion." 210 Pa. Code § 65.38(a). Appellants argue that although we cannot cite *Lattanzi* as precedent, we should look to its reasoning as we interpret *Congini*. Whatever merit there might be to such an argument, we are forced to agree with the district court's conclusion that *Lattanzi's* restrictive reading of *Congini* is "wholly unwarranted," 615 F.Supp. at 332, and we are not bound by it. Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967); National Surety Corp. v. Midland Bank, 551 F.2d 21, 29-30 (3d Cir. 1977).

The Pennsylvania Supreme Court's decision in *Congini*, which imposed civil liability on the defendant corporation Portersville, involved a three-step reasoning process. First, the Court looked to the Pennsylvania Crimes Code to determine whether the actions of Congini, as a minor who consumed alcohol, constituted a criminal offense. Under 18 Pa. Cons. Stat. Ann. § 6308, a person under age 21 commits a summary offense if he "attempts to purchase, purchases, consumes, possesses or transports any alcohol..." A minor who consumes alcohol in Pennsylvania, therefore, has violated a provision of the Pennsylvania Crimes Code.

The Court's second step in its analysis was to determine whether this violation of the Crimes Code established a standard of conduct to be applied in a civil action. To answer this question, the Pennsylvania Supreme Court looked to Section 286 of the Restatement (Second) of Torts for guidance.[12] 470 A.2d at 517-18. *See also Miller v. Hurst*, 448 A.2d 614, 618

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12. RESTATEMENT (SECOND) OF TORTS § 286 provides:

When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted.

The Court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of person which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

(Pa. Super. 1982)(applying Restatement § 286 analysis to hold that violating Pennsylvania's law requiring leashes for dogs constitutes negligence *per se*).

Congini held that § 6308 of the Pennsylvania Crimes Code was evidence of a legislative intent "to protect both minors and the public at large from the perceived deleterious effects of serving alcohol to persons under twenty-one years of age," 470 A.2d at 518, and it therefore held that a violation of § 6308 would constitute negligence *per se* in a civil negligence action.[13]

Although *Congini* did not explicitly address the issue, we observe that 18 Pa. Cons. Stat. Ann. § 6308 does not impose any requirements or standards of conduct on adults. Section 6308 seeks to regulate the behavior of only *minors* with regard to the consumption of alcohol; it imposes no duty on adults to refrain from supplying minors with alcohol. However, as *Congini* noted, "under Section 306 of the Crimes Code . . . an *adult* who furnishes liquor to a minor would be *liable as an accomplice* to the same extent as the offending minor." 470 A.2d at 517 (emphasis added). Therefore, the third and final step of

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13. This reasoning did not conflict with the holding of either *Manning* or *Klein*. In *Manning*, the court refused to find civil liability on the basis of a violation by a non-licensee of the State Liquor Code, 47 Pa. Stat. Ann. 4-493(1), which regulates the serving of alcohol to visibly intoxicated persons. *Manning* did not adopt a standard of negligence *per se* in that case because the range of interests to be protected under the Liquor Code are not as broad as the range of interests to be protected under the Crimes Code. Although the Crimes Code is applicable to all citizens, the Liquor Code is primarily concerned with the actions of licensees. *Congini*, 470 A.2d at 518 n.3; *Manning*, 310 A.2d at 77 (Pomeroy, J., concurring).

Likewise, no liability could be found in *Klein* because no criminal statute exists that regulates the serving of intoxicants to adults.

the *Congini* analysis, the step that enabled the court to find that a cause of action was stated against Portersville, *necessarily* relied on Portersville's status as an "accomplice."

Pennsylvania's accomplice statute, 18 Pa. Cons. Stat. Ann. § 306, provides that a person is an accomplice of another in the commission of an offense if:

> (1) with the *intent* of promoting or facilitating the commission of the offense, he:
>
> (i) solicits such other person to commit it; or
>
> (ii) *aids or agrees or attempts to aid* such other person in planning or committing it; or
>
> (2) his conduct is expressly declared by law to establish his complicity.

18 Pa. Cons. Stat. Ann. § 306 (emphasis added). The "offense" committed in this case was the consumption of alcohol by a minor in violation of 18 Pa. Cons. Stat. Ann. § 6308.[14]

Therefore, it is the minor who, under the *Congini* analysis, must be characterized as the "principal" in the crime. Any other person to whom the criteria of the accomplice statute, 18 Pa. Cons. Stat. § 306, applies, may then be held to be the minor's accomplice.

Thus, when the accomplice statute is applied to the facts of cases such as the instant action, it is clear that two things must be established to hold a defendant civilly liable: (1) the alleged accomplice must have had an *intention* to promote or facilitate the consumption of alcohol by a minor (the accomplice's principal) and (2) the alleged accomplice must have

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14. The full text of 18 Pa. Cons. Ann. § 6308 reads: "A person commits a summary offense if he, being less than 21 years of age, attempts to purchase, purchases, consumes, possesses or transports any alcohol, liquor or malt or brewed beverages."

aided, agreed or attempted to aid in the minor's consumption of alcohol. In the instant case, if Evans consumed alcohol at the fraternity party, any other individuals present who intended to, and did, aid him in that consumption, could come within the cause of action asserted by Fassett and Buckley. The extent and limitations of such a cause of action are addressed in the following section of this opinion.

However, the defendants have contended throughout this litigation that we should not extend the scope of social host liability, but should rather follow the decision of the district court, which restricted liability to direct servers of intoxicants. They urge us to focus on only one particular phrase in the *Congini* opinion, a phrase which they claim limits social host liability to direct servers:

> Under our analysis, an actor's negligence exists in furnishing intoxicants to a class of persons legislatively determined to be incompetent to handle its effects. *It is the person's service which forms the basis of the cause of action...*

470 A.2d at 518 (emphasis added).

The defendants contend that this case should turn on how the term "furnisher" is defined. Following this reasoning, they would have us conclude, as the district court did, that "furnishers" are only those who physically hand alcohol to a minor and that, as a consequence, any defendant who was one step or more removed from that act should not be liable.

We reject this argument. Viewing the *Congini* opinion as a whole, it is clear to us that the language used in this part of the opinion was intended to make no more than a narrow point, rather than to serve as a conclusory statement defining the parameters of liability. This isolated phrase could not have been intended to approve just one basis for establishing

negligence ("furnishing" liquor) to the exclusion of other possible bases (such as, for example, "purchasing" the liquor consumed).

We observe that we are not alone in reading *Congini* to hold that, in Pennsylvania, liability can extend beyond the mere furnishing or serving of liquor. In *Meyers v. Koman*, 36 D. & C.3d 229 (C.P. of Washington County 1984), a party was planned by Kurtis Koman, David Volk, Jr. and Chris Gumbert at the residence of Gumbert's parents. Philip Evans, an eighteen year old, attended the party and consumed intoxicants there. Evans left the party and operated an automobile accompanied by two passengers, one of whom was the plaintiff, Craig Meyers. Meyers alleged that because of Evans' intoxicated condition, Evans lost control of his automobile and Meyers sustained injuries.

Defendant Koman argued that, under *Congini*, he could not be held liable for Meyers' injuries because there were no allegations that Koman had furnished alcohol to minor Evans. The court rejected this view:

> To predicate liability only if it is alleged and proved that the person physically handed a glass of beer to a minor is a misconception of the principle enunciated in *Congini*.
>
> Plaintiff has alleged that Koman, Volk and Gumbert purchased the intoxicants and transported them to the Gumbert residence. It is averred that Koman supplied the tap for the keg. It is further stated that defendants participated in planning the party and dispensing the beer. These acts of defendants are sufficient to make out a case in which preliminary objections cannot be sustained.

Id. at 231-32.

Like the court in *Meyers*, we reject the narrow reading of *Congini* urged upon us by defendants. In our view, *Congini* represents a much broader approach to the pervasive problem of underage drinking than the defendants acknowledge. We conclude that the district court erred in failing to hold that Pennsylvania law recognizes a cause of action against accomplices who assist in a minor's consumption of intoxicants.

C.

We come to the final question to be answered in determining the extent of social host liability in Pennsylvania. Having concluded that those who aid minors in their consumption of intoxicants may be held civilly liable under Pennsylvania law, our task now is to identify the limits of such liability. In order to do so, we must determine both the nature and amount of aid or assistance that is required of an accomplice before civil liability will be imposed.

Because *Congini* had relied upon a criminal statute, 18 Pa. Cons. Stat. Ann. § 306, *see Congini*, 470 A.2d at 517, to support its holding that an accomplice (Portersville) could be held civilly liable, we too begin our analysis with Pennsylvania's accomplice statute, § 306. As we have previously discussed, it is clear that under 18 Pa. Cons. Stat. Ann. § 306, two things must be established to hold a defendant civilly liable: (1) a defendant must have had an *intention* to promote or facilitate the consumption of alcohol by a minor (the accomplice's principal); and (2) he (the accomplice) must have *aided, agreed or attempted to aid* in the minor's consumption of alcohol.

We recognize, however, that the liability which is sought to be imposed is civil and not criminal in nature. Therefore, in giving content to the terms "aiding, agreeing or attempting to aid" in a minor's

consumption of alcohol, we must look to standards governing civil liability. In this circumstance, we are satisfied that the Pennsylvania courts, which in general follow the Restatement of the Law, would once again look to the Restatement for instruction.

Reference to the Restatement of Torts reveals that § 876 deals with situations where liability attaches to an actor who harms a third party by acting in concert with another.[15] The elements of Restatement § 876 and of 18 Pa. Cons. Stat. Ann. § 306, when compared with each other, appear essentially the same. A significant difference, however, is the requirement in Restatement § 876 that the assistance given to another be *substantial*. No such qualification appears in the Pennsylvania Crimes Code.

The recognition of this distinctive element leads us to still another inquiry, i.e. how should substantiality be determined? Once that question is answered, we will have bridged the gap between the criminal accomplice statute and the requirements for establishing accomplice liability, but in a civil context. In doing so, we will have given definition to the extent and limits of civil accomplice liability in a social host cause of action.

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15. RESTATEMENT (SECOND) TORTS § 876 provides:
Persons Acting in Concert

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

We have found the decision of the Court of Appeals for the D.C. Circuit, in *Halberstram v. Welch*, 705 F.2d 472 (D.C. Cir. 1983)(Wald, J.), to be helpful in answering the question of how substantiality should be determined. In *Halberstram*, the appellant, Hamilton, was the live-in companion of a burglar, Welch. In the course of Welch's burglary of Halberstram's home, Welch killed Michael Halberstram. An action for wrongful death and survival was brought by Elliot Halberstram, Michael's personal representative, against both Welch and Hamilton alleging that they had engaged in a joint criminal venture and conspiracy during which the murder took place. The court discussed two theories of liability under which Hamilton could be held liable: civil accomplice (i.e., aiding and abetting by substantial assistance) and civil conspiracy.[16] Because District of Columbia precedent was "somewhat sparse in the area of concerted torts," *id.* at 479, the *Halberstram* court, in reaching its conclusion, looked to the very provisions of the Restatement of Torts on which we rely here.

The Court of Appeals for the D.C. Circuit held that the district court had not erred in holding Hamilton liable for the tortious conduct of primary wrongdoer Welch. Judge Wald, in writing for the court, concluded: "the implications of tort law . . . as a supplement to the criminal justice process and possibly as a deterrant to

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16. The Restatement does not specifically distinguish between accomplices and conspirators. For a discussion of the distinction between civil conspirators and civil accomplices, see Halberstram v. Welch, 705 F.2d 472 (D.C. Cir. 1983). Since *Congini* spoke in terms of accomplice liability, our holding rests on that ground alone, and we decline to reach the issue of whether Pennsylvania would also recognize civil conspiracy liability, or whether the two standards indeed differ. *See* Commonwealth v. Petrie, 419 A.2d 750 (Pa. Super. 1980).

criminal activity cannot be casually dismissed." 705 F.2d at 489.

We draw from *Halberstram*, that where a criminal act which results in subsequent civil liability has been committed, that any aid or assistance given to the primary wrongdoer must be substantial in order for civil liability to attach to the aider, and that substantiality is to be measured by the factors enumerated in Restatement (Second) of Torts § 876(b), comment d.

The six factors suggested by the Restatement for making the determination of whether the assistance rendered by an accomplice is "substantial" include:

a. the nature of the act encouraged;
b. the amount of assistance given by the defendant;
c. the defendant's presence or absence at the time of the tort;
d. the defendant's relation to the other tortfeasor;
e. the defendant's state of mind; and
f. the foreseeability of the harm that occurred.

Id.[17] Of course, all six of these factors are not necessarily relevant in all types of situations; neither do they exhaust the factors that a jury may consider.

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17. The second paragraph of comment d to RESTATEMENT (SECOND) TORTS § 876(b) reads in full:

> The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other. In determining this, the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind are all considered. Likewise, although a person who encourages another to commit a tortious act may be responsible for other acts by the other, ordinarily he is not liable for other acts that, although done in connection with the intended tortious act, were not foreseeable by him. In determining liability, the factors are

Turning to the matter before us, we are satisfied that the Pennsylvania Supreme Court would look to these same factors to determine substantiality of assistance where the civil liability of an accomplice is at issue. If the "aid" given, in terms of 18 Pa. Cons. Stat. Ann. § 306, is deemed "substantial" after consideration of the Restatement § 876(b) factors, then the fact-finder may find that the individual assisting the minor is civilly liable as an accomplice, providing of course that the intent required by § 306 is also present.

In light of this analysis, we conclude that it is not helpful to have liability turn merely on the labels given to particular actors. Characterizations of a defendant in terms of a furnisher, server, purchaser, deliverer, seller, or transporter of liquor, do little to assist the fact-finder in determining liability. Similarly, merely referring to a defendant as an owner or tenant of the premises where alcohol was consumed by a minor, gives little guidance to the informed judgment of the fact-finder.

Each defendant's liability or freedom from liability must depend not on the particular label attached to him, but rather on the complex of factors which determine whether the particular defendant, in aiding, agreeing or attempting to aid a minor in consuming liquor, did so in substantial fashion.

The analysis which we have formulated may or may not, depending upon the circumstances of the particular case, lend itself to summary judgment or other similar proceedings.[18] In those instances where it

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the same as those used in determining the existence of legal causation when there has been negligence (see § 442) or recklessness. (See § 501). [References to illustrations omitted.]

18. We also do not foreclose the possibility that summary judgment may be appropriate for reasons not addressed in this

does not, it will be for the fact-finder, pursuant to the legal principles announced in this opinion, to make the necessary determinations regarding intent and the substantiality of any assistance given.

In the present case, the record to date discloses that Christopher Poch was the president of the fraternity that sponsored the party. He helped organize the party, and he supplied some of the intoxicants consumed. Daniel Hoffend was the treasurer of the fraternity and an organizer of the party; he signed a blank check he knew would be used for the purpose of purchasing intoxicants for the party. Bruce Turgiss, Kevin Zacchea and Michael Bacha all knowingly allowed their apartment to be used for the purpose of serving intoxicants to minors.

Thus, in accordance with appropriate procedure and utilizing the legal principles which we have discussed in this opinion, the question to be answered in the district court is whether these first party defendants intentionally rendered substantial assistance to minor Corbin Evans in his consumption of intoxicants.[19]

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opinion (e.g. statute of limitations, res judicata, comparative negligence, etc.).

19. Fassett and Buckley also urged reversal on the ground that the district court's request for "offers of proof" to be used as a basis for his rulings on the summary judgment motions, was improper under Fed. R. Civ. P. 56. While we note that the recent cases of Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986) and Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986), lend some support to the actions of the district court in this regard, our holding that the Pennsylvania social host liability law would extend liability beyond "furnishers" of alcohol, makes it unnecessary to reach this issue inasmuch as a remand to the district court will now be required. We assume that any subsequent summary judgment proceedings that may be brought, will be conducted in accordance with the requirements of Fed. R. Civ. P. 56.

IV.

Finally, we must consider the separate appeals taken by Bruce Turgiss. Turgiss argues that the court below improperly augmented the record on appeal, and therefore the depositional testimony of Christopher Wackerman is not properly before this court. We agree.

Fed. R. App. P. 10(e) establishes a dichotomy between issues which are to be settled by the district court and issues which are to be settled by the court of appeals. Rule 10(e) authorizes the district court to augment the record in two situations: (1) when the parties dispute whether the record truly discloses what occurred in the district court, or (2) when a material matter is omitted by error or accident. All other questions on the form and content of the record are to be presented to the court of appeals.

It is well-settled that the purpose of Rule 10(e) is not to allow a district court "to add to the record on appeal matters that did not occur there in the course of proceedings leading to the judgment under review." 9 J. MOORE, MOORE'S FEDERAL PRACTICE ¶210.08(1) at 10-55 (2d ed. 1985). *United States ex rel. Mulvaney v. Rush*, 487 F.2d 684, 687 (3d Cir. 1973); *S&E Shipping Corp. v. Chesapeake & Ohio Railway Co.*, 678 F.2d 636, 641-42 (6th Cir. 1982); *Munich v. United States*, 330 F.2d 774, 776 (9th Cir. 1964).

The district court below was not authorized to augment the record on appeal with deposition transcripts that were not on the record before it at the time its final decision was rendered. Similarly, this court could not, on its own motion, accept these records into evidence. The only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court.[20]

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20. It would, of course, be proper for an appellant to assert that a district court judge improperly refused to consider deposition testimony or accept it into evidence. Such a charge could be

Jaconski v. Avisun 359 F.2d 931, 936 n.11 (3d Cir. 1966).

The Wackerman deposition, purportedly containing allegations that Bruce Turgiss was a bartender on the night of the party, was not before the district court when it ruled in favor of Turgiss. Therefore, we have not considered these allegations on appeal. We conclude that the district court erred in augmenting the record on appeal.[21]

V.

We agree with the defendants' contention that the Pennsylvania Supreme Court moved cautiously when it expanded social host liability in the *Congini* decision; the Pennsylvania Supreme Court did not intend to unduly expand the doctrine of social host liability. But we are satisfied that the fact situation presented here is fairly encompassed within the *Congini* rationale. In short, we predict that the Pennsylvania Supreme Court would impose civil liability on individuals who violate the State's criminal laws by intentionally and substantially aiding minors who consume intoxicants.

As to appeals at 85-1652 and 85-1653, we will reverse the district court's orders entered September 18, 1985 and remand these cases to the district court for further proceedings consistent with this opinion.

As to Turgiss' appeals at 86-1102 and 86-1103, we will direct that the district court vacate its order entered January 14, 1986, which augmented the record on appeal.

Each party will bear its own costs on appeal.

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evaluated properly by this court on the basis of the record that was before the district court at the time the decision was made. Such a claim is not raised in the instant case.

21. Our reversal of the ruling dismissing the complaint in favor of Bruce Turgiss and the judgments in favor of the other first party defendants leaves the district court, on remand, free to consider the excluded Wackerman deposition and any other relevant evidence which is proffered by the parties.

ADAMS, J., dissenting.

I part ways with the majority over what may appear to be a small point, but one which I believe has large implications. In my view, there is no final order in this case, as required by 28 U.S.C. § 1291, and thus we lack appellate jurisdiction.

I.

The rule that appeals lie only from final judgments is not only "[t]he historic rule in the federal courts," Advisory Committee Note of 1946 to amended Rule 54(b), Fed. R. Civ. P., but represents a considered policy judgment on the part of Congress that has been emphasized repeatedly by the federal judiciary. *See, e.g., Catlin v. United States*, 324 U.S. 229, 233 (1945) ("The foundation of the policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation.") As Justice Frankfurter observed, the final judgment rule

> was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. . . . Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. . . .

Cobbledick v. United States, 309 U.S. 323, 324-25 (1940). Thus, this Court itself has stated:

> The substance of the dispute here is highly significant, and immediate resolution would clarify an important aspect of . . . law as well as possibly terminating a lengthy controversy.

> However, the wisdom of the final judgment rule lies in its insistence that we focus on systemic, as well as particularistic impacts. The appellate system has become increasingly overburdened and the future would appear to promise no relief from the continuous increase in case loads. Accordingly, it would seem to us to be a disservice to the Court, to litigants in general and to the idea of speedy justice if we were to succumb to enticing suggestions to abandon the deeply-held distaste for piecemeal litigation in every instance of temptation.

Bachowski v. Usery, 545 F.2d 363, 373-74 (3d Cir. 1976). This very language and reasoning were adopted in *Hoots v. Commonwealth of Pennsylvania*, 587 F.2d 1340, 1347 n.40 (3d Cir. 1978).

II.

"In a multiparty lawsuit such as this one, an order is final only if it meets one or the other of two conditions: (1) it must adjudicate the claims or the rights and liabilities of all the parties, *or* (2) [the district court] must expressly determine that there is no just reason for delay and expressly direct the entry of judgment. Rule 54(b), F.R.Civ.P." *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1231 (5th Cir. 1973) (emphasis in original). The only alternative route by which review may be sought of a non-final order is to obtain certification of the question to this Court by the district court. 28 U.S.C. § 1292(b).[1] But such certification was expressly sought in this case, and was specifically denied by the district court.

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1. The doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), allows appellate review of *collateral* orders. For an otherwise unappealable order to be deemed "final" under the collateral order doctrine of *Cohen*, "the order must conclusively determine the disputed question,

I agree with the majority that "it would be anomalous to hold that a plaintiff had no right to appeal the dismissal of all but one of his claims after that one claim not initially dismissed, had thereafter been voluntarily and finally abandoned." Majority typescript, *ante*, at 15. I also agree with the majority that "[u]nder Fed. R. App. P. 4(a)(2) and the *Cape May Greene* reasoning, the 'premature' notices of appeal filed on October 15, 1985 would have become effective upon the final abandonment of the claims against Troy, and appellate jurisdiction would then have vested." The problem here, however, is that the remaining claim -- that against Christopher Troy -- has not been "finally abandoned."

The majority maintains that the order of voluntary dismissal without prejudice represents a final order because it has been more than two years since the accident occurred, and because the plaintiffs themselves claimed at oral argument that to have abandoned their right to press further their claim against Troy. But these arguments are not sustainable on the facts before us.

Although the two years normally allotted for the bringing of actions under Pennsylvania's statute of limitations had already passed as of the time of Troy's dismissal without prejudice, the statute of limitations issue is neither properly before us, nor dispositive of this case. The statute of limitations was not pleaded, was not raised in the district court, nor in the briefs

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resolve an important issue completely separate from the merits of the action, *and* be effectively unreviewable on appeal from a final judgment." *Yakowicz v. Commonwealth of Pennsylvania*, 683 F.2d 778, 783 (3d Cir. 1982). The *Cohen* doctrine thus clearly does not apply to this case. The issue on appeal is not collateral, nor is it one that would evade subsequent review.

filed in this Court. A statute of limitations time bar is not jurisdictional; rather, it constitutes an affirmative defense that the defendant must raise in the answer or else waive. Fed. R. Civ. P. 8(c), 12(c). This Court therefore may not address the issue *sua sponte*. The fact that the statute of limitations could not have been raised at any time in the history of this case to date, as the majority notes, is exactly the point. We have no idea whether or not the time bar will be asserted until the case is in a position where the defendant might do so. Until that occurs -- when the plaintiffs attempt to reinstitute the action against Troy, as permitted under the district court's order -- it is merely speculative whether the plaintiffs will be unable to proceed. The majority's approach is simply not an instance of an appellate court assuming its duty to *decline* jurisdiction where some fact exists barring such jurisdiction; rather, the majority here attempts to *assert* jurisdiction where there is some possibility that *might exist in the future* eliminating the jurisdictional bar.

Moreover, on the record before us, there is nothing to indicate that the action against Troy may not be reinstituted by Fassett following an unfavorable decision on this appeal. *Carr v. Greene*, 516 F.2d 502 (5th Cir. 1975), which the majority cites for the proposition that "the running of the statute of limitations ma[kes] a 'without prejudice' dismissal final for purposes of 28 U.S.C. § 1291," Majority Typescript, *ante* at 15, confined this ruling to "the peculiar circumstances of this case," and noted that "[t]he appealability of an order depends on its effect rather than its language." *Carr*, 516 F.2d at 503 n.1. Neither the effect nor the apparent intention of the parties here was that the dismissal without prejudice would serve to foreclose further proceedings against Troy. Indeed, the colloquy on this point at oral

argument would seem to indicate that, in fact, the intention of the parties was to obtain a *de facto* interlocutory ruling at this time and to preserve the plaintiffs' option to proceed against Troy thereafter (whether or not it would later appear to be remunerative to do so).

Except in the most unusual circumstances, factual representations advanced for the first time at oral argument, especially when unsupported by any affidavits, should not be addressed by this Court, as they do not constitute any part of the Record before us. As the majority does not refer in full to the oral argument, however, it is necessary to raise in turn the remainder of counsels' assertions at oral argument in order to present a complete picture. At oral argument counsel admitted that Troy, Fassett, and Buckley had all agreed that a *de facto* interlocutory appeal would be arranged, whereby the plaintiffs would voluntarily dismiss the claim against Troy, Troy would agree that the dismissal be "without prejudice," and *Troy would not assert the statute of limitations defense* if Fassett and Buckley lost on appeal and then reinstituted the action against Troy. Given this admission by counsel, it is somewhat disingenuous to "assume that Troy would fail to plead a statute of limitations defense only if he were unaware of its availability," and to suggest that the possibility that Fassett and Buckley might reinstate their action and that Troy might not plead the statute of limitations is "mere[ly] theoretical" or "unrealistic." Majority Typescript, *ante* at 16.

In short, the parties worked out the sort of "end-run" around the finality rule which the courts have always disallowed and which the majority's approach passively endorses. Allowing a party, by taking a voluntary dismissal without prejudice, to obtain a *de facto* interlocutory appeal -- especially where certification under § 1292(b) has been denied --

would undercut the statutes governing appealable orders and the underlying philosophy disfavoring piecemeal litigation. As the Ninth Circuit declared in *Fletcher v. Gagosian*, 604 F.2d 637, 639 (9th Cir. 1979), "if we accept appellants' rationale, then we also accept the notion that the policies against multiplicity of litigation and against piecemeal appeals may be avoided at the whim of a plaintiff. He need merely dismiss portions of his complaint without prejudice, appeal from what had been an interlocutory order, and refile the dismissed portion as a separate lawsuit."

I believe, as does the majority, that we must "giv[e] a practical rather than a technical construction to the finality rule." (Quoting *Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 681 (9th Cir. 1980). Unlike *Anderson*, however, in which finality was achieved after the filing of the appeal, we cannot say here that "nothing else remains in the federal courts." *Id.* The claim against Troy may still be reinstated at any time, and the representations of counsel appear to make plain that the parties have reserved that possibility.[2] The dismissal remains without prejudice, and until the defendant raises the limitations bar, the plaintiffs retain their cause of action under the dismissal order.

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2. Even if it were true that plaintiffs have "declared [their] intention to take no further action," Majority Typescript, *ante* at 18, this has little to do with the facts and holding in *Borelli v. City of Reading*, 532 F.2d 950, 951-52 (3d Cir. 1976), on which the majority relies. In *Borelli*, the district court dismissed the complaint without prejudice because the plaintiff had failed to establish standing. Although this Court noted in dictum that "if the plaintiff cannot amend or declares his intention to stand on his complaint," then the order "becomes final and appealable," we dismissed the appeal for want of jurisdiction, because "[w]e need[ed to] go no further than to note that we [were] not confronted with a situation where it [*was*] *not possible*," *id.* at 952 (emphasis added), for the plaintiff "to take further action."

The parties themselves may pursue either of two solutions to this problem. They may return to the district court and seek a dismissal with prejudice of the claim against Troy, ending the possibility and suspicion that they have entered into a mutually agreed upon subterfuge to obtain interlocutory review while keeping alive the possibility of an action against Troy. Or they may proceed against Troy -- a trial that would likely be quite brief -- and then, if appropriate, seek proper review of the final judgment. One or the other of these decisions might affect the possible state proceedings against Troy, but that is a result of the two-track strategy the plaintiffs have chosen to pursue. In any case, if the majority believes that counsel meant what they said (at least as their assertions at oral argument have been reconstructed) -- then it is difficult to see how any of these possible outcomes prejudices the plaintiffs in the least, since "as a pragmatic matter" the plaintiffs would not proceed against Troy anyway because it would cost more than the limited insurance yield that Troy represents. *See* Majority Typescript, *ante* at 18.

Whether we look exclusively to the Record -- from which we see only that the cause was dismissed without prejudice -- or to the representations of counsel at oral argument -- from which we learn that the dismissal without prejudice was part of an arrangement that included Troy's promise not to raise the statute of limitations -- it is clear that this is not a case of narrow technicality versus upholding the spirit of the law, but rather a case of upholding the spirit of the law versus an attempt to undercut the rule of law by artifice. *See, e.g., Sullivan v. Pacific Indemnity Co.*, 566 F.2d 444, 445 (3d Cir. 1977) (noting "our disapproval of indirect attempts to accomplish what cannot be done directly"). I sympathize with the concern that cases not be shuttled needlessly back and forth between the district courts and the courts of

appeals, but the problem here has been created by the parties themselves.

The result reached by the majority today creates a loophole in our jurisdictional limitations, opening the door for future erosion of the principle behind the final judgment rule. Such erosion can only cause greater injustice, inefficiency, and delay in the future: "To review the district court's [decision] under the facts of this case is . . . to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases." *Marshall v. Sielaff*, 492 F.2d 917, 919 (3d Cir. 1974).[3]

III.

I would conclude that this Court lacks jurisdiction to consider the case at this time, and that the only appropriate course is to dismiss the appeal. Accordingly, I respectfully dissent.

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3. This case itself serves as an illustration of that point. The district court's non-final order was entered on September 18, 1985. Thus, more than a full year has been lost from the plaintiffs' taking of this interlocutory appeal. Had the parties proceeded to a final disposition, and then appealed the issues in question, they would have been resolved long ago.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1652

FASSETT, ANNE

v.

DELTA KAPPA EPSILON (NEW YORK)
THE VILLANOVA CHAPTER
OF DELTA KAPPA EPSILON
POCH, CHRISTOPHER
BACHA, MICHAEL
TROY, CHRISTOPHER L.
TURGIS, BRUCE E. AND
ZACHEA, KEVIN

THE VILLANOVA CHAPTER OF DELTA KAPPA EPSILON

v.

EVANS, CORBIN S.
DALLESANDRO, NICHOLAS
BACHA, JR., MICHAEL

THE VILLANOVA CHAPTER OF DELTA KAPPA EPSILON, AND ITS INDIVIDUAL MEMBERS AS OF SEPTEMBER 25, 1982: BRUCE BALTERA, EUGENE CAMPOSANO, LOUIS D'ONOFRIO, WILLIAM J. FUREY, PETER JIRAK, DAVID R. JONES, RICHARD J. KEATING, BOB MAYER, GLENN P. MAYKISH, MICKY MCCLURE, KEN MURPHY, WILLIAM SCOTT O'NEIL, MICHAEL F. O'SULLIVAN, ANTHONY D. PACARO, CHRISTOPHER F. POCH, STEPHEN T. SCHMIDT, CHRISTOPHER L. TROY, BRUCE E.

TURGISS, TIMOTHY F. VALLACE, PAUL VANDEVENTER, CHRISTOPHER J. WACKERMAN, PETER J. WYNNE, KEVIN C. ZACCHEA

TROY, CHRISTOPHER L.

v.

EVANS, CORBIN S. AND D'ALLENSANDRO, NICHOLAS

Anne Fassett,

Appellant

No. 86-1653

BUCKLEY, JOHN L., JR., Administrator of the Estate of BUCKLEY, MONICA T., Deceased

v.

POCH, CHRISTOPHER F.,
TROY, CHRISTOPHER L.,
TURGISS, BRUCE,
ZACCHEA, KEVIN,
HOFFEND, DANIEL,
DELTA KAPPA EPSILON DOUGHERY HALL,
DELTA KAPPA EPSILON OF NEW YORK

v.

THE VILLANOVA CHAPTER OF DELTA KAPPA EPSILON, AND ITS INDIVIDUAL MEMBERS AS OF SEPTEMBER 25, 1982: BRUCE BALTERA, EUGENE CAMPOSANO, LOUIS D'ONOFRIO, WILLIAM J. FUREY, DANIEL J. HOFFEND, PETER JIRAK, RICHARD J. KEATING, BOB MAYER, GLENN P. MAYKISH, MICKY MCCLURE, KEN MURPHY,

WILLIAM SCOTT O'NEIL, MICHAEL F. O'SULLIVAN, ANTHONY D. PACARO, CHRISTOPHER F. POCH, STEPHEN T. SCHMIDT, BRUCE E. TURGIS, TIMOTHY F. VALLACE, PAUL VANDEVENTER, CHRISTOPHER J. WACKERMAN, PETER J. WYNNE, KEVIN C. ZACCHEA

POCH, CHRISTOPHER F.
TROY, CHRISTOPHER L.

v.

EVANS, CORBIN S., D'ALLENSANDRO, NICHOLAS and WYNNE, PETER J.

John L. Buckley, Administrator of the Estate of Monica T. Buckley, Deceased,

Appellant

No. 86-1102

FASSETT, ANNE

v.

DELTA KAPPA EPSILON (NEW YORK)
THE VILLANOVA CHAPTER
OF DELTA KAPPA EPSILON
POCH, CHRISTOPHER
BACHA, MICHAEL
TROY, CHRISTOPHER L.
TURGIS, BRUCE E. AND
ZACHEA, KEVIN

THE VILLANOVA CHAPTER OF DELTA KAPPA EPSILON

v.

EVANS, CORBIN S.
DALLESANDRO, NICHOLAS
BACHA, JR., MICHAEL
HOFFEND, DANIEL

THE VILLANOVA CHAPTER OF DELTA KAPPA EPSILON, AND ITS INDIVIDUAL MEMBERS AS OF SEPTEMBER 25, 1982: ROBERT J. ACKERMAN, BRUCE BALTERA, THOMAS C. BROCKWELL, EUGENE CAMPOSANO, KEVIN CONNOR, JOSEPH F. DELANEY, LOUIS D'ONOFRIO, RICHARD J. DULCEY, DANIEL M. FARRELL, SEAN P. FLANAGAN, WILLIAM J. FUREY, PAUL A. GENTILE, DANIEL J. HOFFEND, PETER JIRAK, DAVID R. JONES, RICHARD J. KEATING, ATTILA A. KOC, BOB MAYER, GLENN P. MAYKISH, MICKY MCCLURE, STEVEN M. MCEVOY, JOHN J. MCGEE, THOMAS M. MULROY, KEN MURPHY, RONALD A. NAUMAN, WILLIAM SCOTT O'NEIL, MICHAEL F. O'SULLIVAN, ANTHONY D. PACARO, CHRISTOPHER F. POCH, HENRY ROHRER, STEPHEN T. SCHMIDT, JOSEPH A. TORRISI, CHRISTOPHER L. TROY, BRUCE E. TURGISS, TIMOTHY F. VALLACE, PAUL VANDEVENTER, CHRISTOPHER J. WACKERMAN, JAMES T. WILSON, PETER J. WYNNE, KEVIN C. ZACCHEA

TROY, CHRISTOPHER L.

v.

EVANS, CORBIN S.
AND D'ALLENSANDRO, NICHOLAS

Bruce Turgiss,

Appellant

No. 86-1103

BUCKLEY, JOHN L., JR., Administrator of
the Estate of BUCKLEY, MONICA T., Deceased

v.

POCH, CHRISTOPHER F.,
TROY, CHRISTOPHER L.
TURGISS, BRUCE,
ZACCHEA, KEVIN,
BACHA, MICHAEL, JR.,
HOFFEND, DANIEL,
DELTA KAPPA EPSILON DOUGHERY HALL,
DELTA KAPPA EPSILON OF NEW YORK

v.

THE VILLANOVA CHAPTER OF DELTA KAPPA EPSILON, AND ITS INDIVIDUAL MEMBERS AS OF SEPTEMBER 25, 1982: ROBERT J. ACKERMAN, BRUCE BALTERA, THOMAS C. BROCKWELL, EUGENE CAMPOSANO, KEVIN CONNOR, JOSEPH F. DELANEY, LOUIS D'ONOFRIO, RICHARD J. DULCEY, DANIEL M. FARRELL, SEAN P. FLANAGAN, WILLIAM J. FUREY, PAUL A. GENTILE, DANIEL J. HOFFEND, PETER JIRAK, DAVID R. JONES, RICHARD J. KEATING, ATTILA A. KOC, BOB MAYER, GLENN P. MAYKISH, MICKY MCCLURE, STEVEN M. MCEVOY, JOHN J. MCGEE, THOMAS M. MULROY, KEN MURPHY, RONALD A. NAUMAN, WILLIAM SCOTT O'NEIL, MICHAEL F. O'SULLIVAN, ANTHONY D. PACARO, CHRISTOPHER F. POCH, HENRY ROHRER, STEPHEN T. SCHMIDT, JOSEPH A. TORRISI, BRUCE E. TURGIS, TIMOTHY F. VALLACE, PAUL VANDEVENTER, CHRISTOPHER J. WACKERMAN,

JAMES T. WILSON, PETER J. WYNNE, KEVIN C. ZACCHEA

POCH, CHRISTOPHER F.
TROY, CHRISTOPHER L.

v.

EVANS, CORBIN S., D'ALLENSANDRO, NICHOLAS and WYNNE, PETER J.

Bruce Turgiss,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Nos. 84-4613, 84-4624)

Argued September 15, 1986

BEFORE: ADAMS, STAPLETON, and GARTH
Circuit Judges

ORDER AMENDING OPINION

It is ORDERED that the opinion in the above-captioned matter, filed December 5, 1986, is hereby amended as follows:

1. Page 25, lines 9 and 10, delete from text the phrase "whether the actions of Congini, as a minor who consumed alcohol,"; and

2. Page 36, footnote 18, delete the words "comparative negligence," from the footnote.

By the Court,

/s/Leonard I. Garth

Circuit Judge

Dated: December 10, 1986

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

ANNE FASSETT

v.

CHRISTOPHER F. POCH, et al.

v.

ATTILLA KOC, et al.

JOHN L. BUCKLEY, JR., Administrator
of the Estate of Monica T. Buckley, Deceased

v.

CHRISTOPHER F. POCH, et al.

v.

ATTILLA KOC, et al.

Civ. A. Nos. 84-4613, 84-4624.

UNITED STATES DISTRICT COURT,
E.D. Pennsylvania
December 3, 1985

Actions were brought for death of one passenger and serious injuries to another after minor driver of car in which passengers were riding left college fraternity party after consuming intoxicating beverages. The actions were consolidated for trial purposes, and several motions to dismiss and for summary judgment were filed. The District Court, Bechtle, J., held that: (1) Pennsylvania common law did not recognize theory of liability for conspiracy to purchase alcoholic beverages for party; (2) tenants, by agreeing to provide their leased home for party, did not "furnish" alcohol so as to invoke social host liability; (3) fraternity members who purchased or transported alcohol to party with knowledge that alcohol would be served to minors did not "furnish" alcohol so as to invoke social hosts liability; but (4) evidence presented genuine issues of material fact as to whether two fraternity members served alcohol, to the point of intoxication,

to minor driver, precluding summary judgment in their favor.

Order in accordance with opinion.

1. Automobiles 229½
Death 8

At least to all liability issues, Pennsylvania law applied to actions brought for death of one passenger and serious injuries to another after minor driver attended party organized by members of college fraternity at which alcoholic beverages were served to driver, in that Pennsylvania was place of injuries and place at which alleged tortious conduct took place, and all parties were attending Pennsylvania schools at time of accident.

2. Intoxicating Liquors 299

Hosts of private, noncommercial social gathering could not be held liable for violations of Pennsylvania Dram Shop Act, 47 P.S. §4-493(1).

3. Intoxicating Liquors 299

Under Pennsylvania common law, minor social host can be liable for serving alcohol to a minor.

4. Intoxicating Liquors 299

In determining whether minor social hosts can be held liable for serving alcohol to a minor, minor social hosts, under Pennsylvania common law, are to be placed in three categories based on their ages: minors under age of seven years are conclusively presumed incapable of negligence; minors over age of fourteen years are presumptively capable of negligence, burden being placed on such minors to prove their incapacity; and minors between ages seven and 14 years are presumed incapable of negligence, but such presumption is rebuttable and

grows weaker with each year until fourteenth year is reached.

5. Intoxicating Liquors 299

Pennsylvania common law did not recognize theory of liability that social hosts conspired together to purchase alcoholic beverages for college fraternity party, knowing many guests would be under 21 years of age and would be driving to and from the party.

6. Intoxicating Liquors 299

Under Pennsylvania common law, plaintiff, in order to hold social host liable for damages caused to or by an intoxicated minor, must establish that social host actually furnished intoxicants to minor.

7. Intoxicating Liquors 299

Under Pennsylvania common law, membership in college fraternity or attendance at college fraternity party at which alcoholic beverages were served to minors was insufficient to invoke social host liability.

8. Intoxicating Liquors 299

Under Pennsylvania common law, tenants, by agreeing in exchange for free admission to provide their leased home for college fraternity party at which alcohol was served to minors, did not "furnish" alcohol so as to invoke social host liability.

See publication Words and Phrases for other judicial constructions and definitions.

9. Intoxicating Liquors 299

Under Pennsylvania common law, college fraternity members who purchased or transported alcoholic beverages to fraternity party did not "furnish" alcohol so as

to invoke social host liability for death of one minor and serious injuries to another arising from car accident, even though members knew alcohol would be served to minors.

10. Intoxicating Liquors 299

Under Pennsylvania common law, only those who actually serve alcohol directly to a minor guest or are in position to exercise complete control over actual dispensing of alcohol can be subject to social host liability.

11. Federal Civil Procedure 2515

Under Pennsylvania common law, evidence presented genuine issues of material fact as to whether college fraternity members served alcohol directly to minor, who was subsequently involved in motor vehicle accident in which one of his passengers was killed and another passenger seriously injured, precluding summary in those members' favor.

Robert E. Slota, Bryn Mawr, Pa., for plaintiff in Civ. A. No. 84-4613.

John J. McAuliffe, Jr., Philadelphia, Pa., for plaintiff in Civ. A. No. 84-4624.

Wallace A. Murray, Jr., Norristown, Pa., Robert S. Davis, Philadelphia, Pa., for Delta Kappa Epsilon (New York).

Benjamin E. Zuckerman, Norristown, Pa., for Christopher Poch.

David L. Steck, Philadelphia, Pa., for Michael Bacha.

Joseph W. Fullem, Jr., Philadelphia, Pa., for Christopher L. Troy.

John J. O'Brien, III, Philadelphia, Pa., for Bruce E. Turgiss.

Joseph P. Connor, III, Philadelphia, Pa., for Kevin Zachea.

Robert St. Leger Goggin, Philadelpia, Pa., for Corbin S. Evans.

Earl T. Britt, Michael O. Kassak, Philadelphia, Pa., for Nicholas D'Allesandro.

John F. Dougherty, Jr., Philadelphia, Pa., for Daniel Hoffend.

Edwin L. Scherlis, Philadelphia, Pa., for Robert J. Ackerman, Henry Rohrer, Richard Dulcey, John McGee & Joseph Delaney.

L. Oliver Frey, Philadelphia, Pa., for Bruce Baltera in Civ. A. No. 84-4613.

Donald J.P. Sweeney, Philadelphia, Pa., for Thomas C. Brockwell, Peter J. Wynne & Steven McEvoy and Sean Flanagan.

Susan Warnock Thomas, Philadelphia, Pa., for Kevin Connor.

Daniel G. Brehm, Wayne, Pa., for Louis D'Onofrio.

Joseph F. VanHorn, Jr., Philadelpia, Pa., for Daniel M. Farrell & Thomas M. Mulroy.

Donald J.P. Sweeney, Philadelphia, Pa., for Sean P. Flannagan.

John J. Barr, Philadelphia, Pa., for Paul A. Gentile.

Madeline M. Sherry, Philadelphia, Pa., for David R. Jones in Civ. A. No. 84-4613.

John Gerard Devlin, Philadelphia, Pa., for Attilla A. Koc & Joseph Torrisi.

David M. McCormick, Philadelphia, Pa., for Ronald A. Nauman.

Dean F. Murtagh, Philadelphia, Pa., for Anthony D. Pacaro.

Peter J. Hoffman, Philadelphia, Pa., for James T. Wilson.

Gerry J. Woods, Philadelphia, Pa., for David R. Jones in Civ. A. No. 84-4624.

John A. Orlando, Philadelphia, Pa., for Christopher J. Wackerman and Bruce Baltera in Civ. A. No. 84-4624.

MEMORANDUM

BECHTLE, District Judge.

In the above-captioned actions, consolidated for trial purposes, plaintiffs seek to recover damages resulting from an automobile accident in which Monica Buckley was killed and Anne Fassett sustained serious injuries. Jurisdiction is based on diversity.

On September 17, 1985, the court entered Orders concerning numerous motions to dismiss and motions for summary judgment. The following sets forth the court's reasoning for so ordering.

I. FACTS

In considering either a motion to dismiss or a motion for summary judgment, the court must construe all facts and inferences in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). A motion to dismiss should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). Summary judgment is proper only when the record clearly establishes that no genuine issue of material fact remains to be tried and that the moving party is entitled to judgment as a matter of law. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1962); *Ely v. Hall's Motor Transit Co.*, 590 F.2d 62, 66 (3d Cir. 1978).

Based on these standards, the facts in this case are as follows:

On the evening of September 25 and the morning of September 26, 1982, Monica T. Buckley, Anne Fassett and Corbin S. Evans attended a party organized by members of the Villanova University chapter of Delta Kappa Epsilon ("DKE-Vill"). DKE-Vill members advertised the

party around the Villanova Campus; sold tickets; bought liquor and beer for the party; brought in a portable bar and punch dispenser; arranged for a stereo music system; and served as bartenders, doormen and on clean-up crews. The party was held at a private home on Wynnewood Road in Philadelphia, Pennsylvania, which premises were leased by four Villanova students—Christopher Troy, Bruce Turgiss, Kevin Zacchea and Michael Bacha. Three of the tenants, Turgis, Troy and Zacchea, were members of DKE-Vill. Bacha was not a member of the fraternity. The consent of the four tenants was obtained to hold the party at the premises in exchange for their free admission to the party. Alcoholic beverages were served to the guests at the party, the majority of whom were under twenty-one years of age.

Early on the morning of September 26, 1982, Monica Buckley, Anne Fassett and Corbin Evans departed the party in a vehicle driven by Corbin Evans. Mr. Evans, a minor at the time of the party, admittedly consumed intoxicating beverages before departing the party. After driving only a short distance, Mr. Evans' vehicle collided with a pick-up truck driven by Nicholas D'Alessandro. Tragically, Monica Buckley was killed and Anne Fassett suffered severe personal injuries.

As a result of this accident, plaintiff Anne Fassett ("Fassett") instituted two lawsuits. The first action was brought in the Philadelphia Court of Common Pleas against, among others, Corbin Evans and Nicholas D'Alessandro.[1] The case went to verdict against Corbin Evans alone[2] in the amount of approximately $5,100,000.00. Fassett's second action is the federal lawsuit presently before this court. In this matter, Fassett has brought suit against the four lessees of the premises where the party was held (Christopher Troy, Bruce Turgiss, Kevin Zacchea, and Michael Bacha),

1. December Term, 1982, No. 997
2. Fassett voluntarily dismissed D'Alessandro from this action.

Christopher Poch, the president of the Villanova Chapter of DKE, the National Chapter of DKE ("DKE-New York") and DKE-Vill.[3]

The material allegations of Fassett's second amended complaint are as follows:

49. On or about the evening of September 25 and the morning of September 26, 1983, Defendants, and each of them, sponsored, organized, held, operated, directed, managed and otherwise conducted a party at which alcoholic beverages were served. Said party was held at the premises located at 1825 Wynnewood Road in Philadelphia, PA.

50. At this party, Defendants, and each of them, caused to be served to one Corbin Evans, a minor, alcoholic beverages of an undisclosed amount to the point that Evans was under the influence of alcohol.

51. Evans, thereafter, drove a 1975 Fiat on Wynnewood Road in Philadelphia, PA, while Plaintiff, Anne Fassett, was a passenger of the 1975 Fiat.

52. As a result of Defendants' conduct, above described, Evans was involved in an accident.

53. As a further result of Defendants' conduct, Plaintiff suffered severe and permanent injuries, including but not limited to, quadriplegia.

. . . .

60. Defendants' negligence consists of serving alcoholic beverages and intoxicants to the minor, Corbin Evans.

As a result of the aforementioned automobile accident, John L. Buckley, Jr., administrator of the estate of Monica Buckley ("Buckley"), similarly instituted two lawsuits. The first action was brought in Philadelphia Court of Common Pleas against, among others, Corbin

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3. On June 13, 1985, having been advised by plaintiff's counsel that Fassett did not oppose the motion, the court granted DKE-New York's motion for summary judgment. On September 12, 1985, pursuant to Fed.R.Civ.P. 21, the court granted Fassett's motion to voluntarily dismiss DKE-Vill.

Evans and Nicholas D'Alessandro.[4] On May 24, 1985 the parties settled this matter, executing a Joint Tortfeasor Release for the sole consideration of $275,000.00. Buckley's second action is the federal lawsuit presently before this court. In this matter, Buckley has brought suit against three of the lessees of the premises where the party was held (Christopher Troy, Bruce Turgiss, and Kevin Zacchea),[5] Christopher Poch, Daniel Hoffend, the treasurer of DKE-Vill and DKE-New York.[6]

The material allegations of Buckley's amended complaint are as follows:

11. On or about September 26, 1982, any or all of the defendants herein both individually and/or in their capacity as agents, servants, employees and/or representative officers of Delta Kappa Epsilon of New York, *unlawfully agreed and conspired among themselves to hold a party* at 1825 Wynnewood Road, Philadelphia County, Pennsylvania, at which party *they would provide in a negligent manner, alcoholic beverages to minors.*

12. On or about September 25 or 26, 1982, and for a long time prior thereto, the aforementioned premises and fraternity house was managed, operated, supervised, controlled and/or maintained either jointly and/or severably by the defendants, Christopher L. Troy, Bruce Turgiss, Christopher F. Poch, Daniel Hoffend, Kevin Zacchea and/or Delta Kappa Epsilon of New York.

13. *All of the defendants individually, and/or in conspiracy with each other and in concert with each other, and/or in an agency relationship and/or in concert with Delta Kappa Epsilon of New York* were careless and negligent in that they:

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4. November Term, 1982, No. 6781.

5. The fourth lessee, Michael Bacha, was apparently not named as a defendant by Buckley in order to preserve diversity jurisdiction.

6. On May 29, 1985, having been advised by plaintiff's counsel at a hearing on May 24, 1985 that Buckley did not oppose the motion, the court granted DKE-New York's motion for summary judgment.

a) Negligently provided alcoholic beverages to a minor who operated a car in which Plaintiff's decedent was a passenger, in such a manner that it was involved in a vehicular collision resulting in Plaintiff's decedent's death;

b) *Negligently providing a minor* with *alcoholic beverages to the point where he became intoxicated* and as a driver, was in an accident, resulting in Plaintiff's Decedent's death;

c) The defendants Troy, Turgiss and Zacchea, being possessors of and having control over the land where the party was held at their house, were negligent, breaching a duty owed to Plaintiff's decedent as an invitee and also to the driver of the car in which Plaintiff's decedent was a passenger, who was also an invitee at the party;

d) Violations of the statutes of the Commonwealth pertaining to the purchasing, selling or providing of alcoholic beverages to minors, one of whom was the driver of the car Plaintiff's decedent was in;

e) Violation of the Liquor Code (47 P.S. § 4-493(1)), making it a violation to provide alcoholic beverages to any person visibly intoxicated;

f) Furnishing intoxicating beverages to minors who have legislatively been determined to be incompetent to handle its effects;

g) Being otherwise careless and negligent under the circumstances.

14. As a result of all of the defendant's negligence individually and/or in concert and agreement with each other, and/or in their capacity as agents, servants, employees and/or representative officers of Delta Kappa Epsilon of New York, *one of the minors who had been served alcoholic beverages to the point of intoxication* at

the 1825 Wynnewood Road party was involved in a vehicular collision with Plaintiff's decedent as his passenger, as a result of which Plaintiff's decedent sustained injuries resulting in her death.

On May 13, 1985, this court consolidated the two actions for trial purposes. In the interim, third-party complaints were filed in both actions against all the members of DKE-Vill at the time of the party, in their individual capacity, and against Corbin Evans and Nicholas D'Alessandro, the drivers of the vehicles involved in the accident.[7] An extensive period of discovery ensued during which the court was inundated with motions to dismiss and motions for summary judgment.

At a hearing held on May 24, 1985, in order to help the court decide these motions, the court ordered that each plaintiff and each third-party plaintiff submit detailed offers of proof stating the factual basis of their claims against those defendants they sought to hold liable. The court specifically instructed:

> I am going to require that there be filed with the court an offer of proof that the plaintiffs have against every defendant. That will be filed with the court and served on the parties. . . . *It should set forth not legal conclusions but the factual evidence plaintiffs have against* the particular defendants they'll have at this trial, all right?
>
> . . . .
>
> [T]he Court will consider motions to dismiss

7. In the *Fasset* case: defendant Poch filed a third-party complaint against Corbin Evans; defendant Troy filed a third-party complaint against Corbin Evans, Nicholas D'Alessandro and Daniel Hoffend; defendant Bacha filed third-party complaints against Evans, D'Alessandro, Hoffend, DKE-Vill and its individual members as of the date of the accident.

In the *Buckley* cases: defendant Troy filed a third-party complaint against Evans, D'Alessandro, Bacha, DKE-Vill and its individual members as of the date of the accident.

based on [these] offers of proof. *If they're not adequate . . . [t]he case will be dismissed on that offer of proof itself.*

So, I don't want a lot of general conclusions in these offers of proof. Oh, they were all negligent when they did these things. *I want precision and exactness.* It can be done and it should be done.

Just like an opening statement to the jury: Members of the jury . . . [W]e're going to prove that defendant X was negligent in the following manner on a certain day and time and he did something. I'm going to look at that, and if that's enough to support sending that case to the jury as proven, okay, we'll say there won't be any denial, but if it's not, I'm going to dismiss the case.

That's the importance of the accuracy and the precision of these offers of proof. (Emphasis added).

After reviewing the written offers of proof submitted by the parties in response to this order, the court held a hearing on September 12, 1985 in order to allow each plaintiff and third-party plaintiff an opportunity to add anything in open court to their written offers of proof, prior to the court's ruling on the outstanding motions. It was upon these written offers of proof, as supplemented orally at the September 12, 1985 hearing, that the court endeavored to decide the outstanding motions.

II. DISCUSSION

[1] The motions before the court present two, heretofore unanswered questions concerning social host liability in Pennsylvania:

1) Whether Pennsylvania[8] would recognize a

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8. In the present case, Pennsylvania has the most significant contacts with the parties and the circumstances out of which this action arose. Pennsylvania is the place of the injuries, and the place

cause of action against a *minor* social host for serving/furnishing alcohol to another minor, proximately resulting in personal injuries and/or death to the intoxicated minor or to third persons?

2) What conduct constitutes serving/furnishing alcohol in the social host liability setting?

In order to fully understand the court's answers to these questions, a review of current Pennsylvania law concerning social host liability in necessary.

[2] In *Manning v. Andy*, 454 Pa. 237, 310 A.2d 75 (1973) the Pennsylvania Supreme Court refused to recognize a cause of action against a non-licensed social host premised on violations of Section 493(1) of the Pennsylvania Liquor Code, 47 Pa.Stat. § 4-493(1) (also known as the "Dram Shop Act"). The court held that the Liquor Code only applies to liquor licensees. Violations of the Liquor Code cannot form the basis of a cause of action against a non-licensee. 310 A.2d at 76. *See also, Klein v. Raysinger*, 504 Pa. 141, 470 A.2d 507, 508 n. 6 (1983); *Congini v. Portersville Valve Co.*, 504 Pa. 157, 470 A.2d 515, 518 n. 3 (1983). The *Manning* court concluded that the decision of whether to extend liability to non-licensees is "best left to the legislature." 310 A.2d at 76.[9]

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where the alleged tortious conduct took place. All parties were temporary residents of Pennsylvania, attending Pennsylvania schools at the time of the accident. Consequently, at least as to all liability issues, Pennsylvania law applies. *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

9. There are no allegations that any of the defendants or third-party defendants were licensees, or acting as the agent, servants or employees of any licensees under the Dram Shop Act. All evidence suggests that this was clearly a private, non-commercial social gathering. Consequently, to the extent any liability claim is based on violations of the Pennsylvania Liquor Code, *see e.g., Buckley* amended complaint at paragraph 13(e), such claim is dismissed.

In *Klein v. Raysinger*, 504 Pa. 141, 470 A.2d 507 (1983), the Pennsylvania Supreme Court was faced, for the first time, with the issue of whether a non-licensed host could be subject to a cause of action based on common-law tort notions. After carefully reviewing how other jurisdictions decided this issue, the court held that no common law liability exists on the part of a social host for the service of alcohol to his guests. the court stated:

> [T]he great weight of authority supports the view that in the case of an ordinary able bodied man it is the consumption of the alcohol, rather than the furnishing of the alcohol, which is the proximate cause of any subsequent occurrence. This is in accord with the recognized rule at common law. *See* Anno.: *Damage from Sale or Gift of Liquor or Drug*. 97 A.L.R.3d 528 § 2 at 533 (1980); 45 Am.Jur.2d. Intoxicating Liquor § 533. We agree with this common law view, and consequently hold that there can be no liability on the part of a social host who serves alcoholic beverages to his or her adult guests.

470 A.2d at 510-11. *See also, Sites v. Cloonan*, 328 Pa.Super. 481, 477 A.2d 547 (1984).

On the same day that the Supreme Court issued its opinion in *Klein*, the court rendered a decision in another case that created an exception to the general rule established in *Klein*. In that case, *Congini v. Portersville Company*, 504 Pa. 157, 470 A.2d 515 (1983), plaintiff, a minor, was served alcoholic beverages by the agents of the defendant employer at a Christmas party given by the employer. The minor plaintiff became visibly intoxicated and was subsequently seriously injured in an automobile accident on his way from the party. The *Congini* court held that a social host was "negligent per se" for serving alcohol "to the point of intoxication" to a *minor*, and that the host could be held liable for injuries proximately resulting from the minor's intoxication. 470 A.2d at 518. The court based its decision on the special

treatment of minors in the Pennsylvania Crimes Code relating to the sale and consumption of alcohol by minors.

> In *Klein v. Raysinger* . . . we held that there exists no common law liability on the part of a social host for the service of intoxicants to his adult guests. In arriving at this decision we relied upon the common law rule that in the case of an ordinary able bodied man, it is the consumption of alcohol rather than the furnishing thereof, that is the proximate cause of any subsequent damage.
>
> However, our legislature has made a legislative judgment that persons under twenty-one years of age are incompetent to handle alcohol. Under Section 6308 of the Crimes Code [footnote omitted] 18 Pa.C.S. § 6308, a person "less than 21 years of age" commits a summary offense if he "attempts to purchase, purchases, consumes, possesses or transports any alcohol, liquor or malt or brewed beverages." Furthermore, under Section 306 of the Crimes Code, 18 Pa.C.S.A. § 306, an adult who furnishes liquor to a minor would be liable as an accomplice to the same extent as the offending minor.
>
> This legislative judgment compels a different result than *Klein*, for here we are not dealing with ordinary able bodied men. Rather, we are confronted with persons who are, at least in the eyes of the law, incompetent to handle the affects of alcohol.

470 A.2d at 517. Applying section 286 of the Restatement (Second) of Torts,[10] the court adopted the statutory

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10. Section 286 of the Restatement (Second) of Torts provides:

§ 286. When Standard of Conduct Defined by Legislation or Regulation Will be Adopted The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

standard of conduct set forth in § 6308 of the Crimes Code as the standard of a reasonable person, concluding that a host who serves alcoholic beverages to a minor to the point of intoxication is negligent per se.[11]

In *Douglas v. Schwenk*, 330 Pa.Super. 392, 479 A.2d 608 (1984), the *Congini* exception was extended so that third-parties could recover from those *furnishing* or serving intoxicating beverages to a minor so long as there was a causal connection between the furnishing of the liquor and the accident. In *Douglas*, plaintiff passenger was killed in an automobile accident involving a minor driver *who was furnished alcohol at a bar* by the third-party defendants, who were adult patrons at the bar.

A. *Liability of a Minor Social Host*

In the present case, many, if not all of the defendants and third-party defendants were under twenty-one years of age at the time of the alleged negligent activity. While it is true that both *Congini* and *Douglas* involved *adult* social hosts serving liquor to a minor, there is no definitive indication in either opinion that such liability would

NOTES (*Continued*)

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results. This section has been adopted as the law of Pennsylvania, *Majors v. Brodhead Hotel*, 416 Pa. 265, 205 A.2d 873, 875 (1965).

11. It is important to emphasize the court's language "to the point of intoxication" which indicates the court's understanding that liability is not premised upon serving additional alcohol to an already visibly intoxicated minor, but merely serving the minor sufficient alcohol to cause the minor to become intoxicated. *See Mancuso v. Bradshaw*, 338 Pa.Super. 328, 487 A.2d 990, 994 (1985) (Beck, J. concurring). In the present case, therefore, plaintiffs need only show that a particular defendant served alcohol to Corbin Evans to the point of intoxication, not that he was served additional alcohol once visibly intoxicated.

or would not apply to a *minor* social host. Defendants assert that the court in *Lattanzi v. Tori*, 341 Pa.Super. 625, 491 A.2d 925 (1985), held that, in Pennsylvania, only an *adult* social host can be liable for serving alcohol to a minor. In support of their position, defendants cite the following excerpt from the *Lattanzi* opinion:

> Although the cases [*Congini* and *Douglas*] establish new causes of action in Pennsylvania, we do not find them mandating yet another one under the facts of this case. It is clear from *Congini* that the supreme court was refering to the liability of *adults* who *furnished* minors with intoxicating liquors. In the instant cases, appellants do not allege that Bray or Campbell "furnished" Coffey with alcoholic beverages, and they concede that the two were "incompetent" under section 6308 of the Crimes Code, i.e., under 21 years of age. *See Congini, supra*, [504 Pa.] at [161], 470 A.2d at 517.

Slip op. at 4 (emphasis in original).

First, and foremost, the court simply disagrees with the *Lattanzi* court's finding that "[i]t is clear from *Congini* that the supreme court was referring to the liability of *adults* . . ." To the contrary, this court finds no such implication. In fact, the *Congini* decision implies that an action against a minor social host should be recognized. *Congini* held that an eighteen year old driver could be contributorily negligent for drinking alcohol. "[A]n eighteen year old person is presumptively capable of negligence." 470 A.2d at 518. *The logical implication is that if an eighteen year old is presumed capable of negligently consuming alcohol, he/she should be competent to meet the same standard concerning the furnishing of alcohol.*[12]

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12. To the extent *Lattanzi* conflicts with the Supreme Court's ruling in *Congini*, this court is not bound by the Superior Court's decision.

Furthermore, the defendants' contention that *Lattanzi* holds that social host liability in Pennsylvania is restricted to "adult" social hosts is wholly unwarranted. As will be discussed more fully later in this opinion, *Lattanzi* stands solely for the proposition that where two or more persons *conspire* together to violate the Pennsylvania underage drinking law, 18 Pa.Con.Stat. § 6308, by purchasing, transporting and making alcohol available to a minor guest who then becomes intoxicated and injures a third party, that third party does *not* have a cause of action against the co-conspirators. At best, the above-quoted passage from *Lattanzi* is dictum which this court is not bound by.

[3] Consequently, this court must decide, for the first time, whether Pennsylvania would recognize a cause of action against a minor social host. The court finds that Pennsylvania would recognize such a cause of action.

There is no justifiable reason to automatically absolve a social host from liability solely because the host is under twenty-one years of age. It is inconceivable that a minor guest or innocent third-party who suffers harm as a result of the serving of alcohol to the minor guest, may assert a cause of action against a twenty-one year old social host, yet would be precluded from asserting a similar cause of action against a twenty year old social host. These inopposite results arise solely from the fortuitous circumstances of the age of the tort-feasor, rather than the conduct of the social host.

On the other hand, to hold a minor to the adult standard of "negligence per se" established in *Congini* is equally unreasonable. It would be ludicrous, for example, to allow an action against a nine year old child for injuries sustained by the child's eighteen year old babysitter in a car accident, after the child, upon the babysitter's request, served the babysitter from her

parent's liquor cabinet. Unquestionably, in considering a minor social hosts' liability, the age of the minor host must be taken into consideration.

[4] Accordingly, the court finds that in considering the liability of a minor social host, Pennsylvania would apply the scheme set up by the Pennsylvania Supreme Court in *Kuhns v. Brugger*, 390 Pa. 331, 135 A.2d 395 (1957), to wit:

> . . . we place minors in three categories based on their ages: minors under the age of seven years are conclusively presumed incapable of negligence; minors over the age of fourteen years are presumptively capable of negligence, the burden being placed on such minors to prove their incapacity; minors between the ages of seven and fourteen years are presumed incapable of negligence, but such presumption is rebuttable and grows weaker with each year until the fourteenth year is reached.

135 A.2d at 401. *See also, Berman v. Phila. Bd. of Education*, 310 Pa.Super. 153, 456 A.2d 545 (1983).

B. *Conspiracy to Serve Alcohol to Minors*

[5] In the present case, liability against the original defendants, and all of the third-party defendants, except the drivers of the vehicles involved in the accident, is premised primarily upon a conspiracy theory — that is, that the defendants conspired together to purchase and furnish alcoholic beverages at a fraternity party knowing that many of the guests would be under twenty-one years of age and that they would be driving to and from the party. Pennsylvania does not recognize such a conspiracy theory.

In *Congini*, the Supreme Court articulated a narrow exception to the general rule against social host liability. The court was particularly aware and sensitive to the fact that it was carving out and extending liability in Pennsylvania to a new area. For this reason, the *Congini exception must be strictly construed*. In a factual scenario

similar to the present case, the Pennsylvania Superior Court refused to extend the *Congini* exception to include a conspiracy theory of liability. In *Lattanzi v. Tori*, 341 Pa.Super. 625, 491 A.2d 925 (1985), the action of each defendant consisted of traveling with the other defendants to New Jersey, purchasing beer and returning back to Pennsylvania where the beer was consumed at the home of one defendant. The complaints alleged that as a direct result of the defendants' illegal conspiracy to purchase, transport and consume alcoholic beverages, one of the defendants became intoxicated, ultimately resulting in an automobile accident in which plaintiff's decedent was killed and a second plaintiff was severely injured.

On appeal from the lower court's dismissal of the complaints, the superior court framed the sole issue before the court as follows:

> Where two or more persons combine to violate 18 P.C.S. § 6308, the underage drinking law, and as a result of overt acts taken in furtherance of that combination, a third party suffers the kind of damages that the statute seeks to prevent, does the third party have a cause of action against the co-conspirators?

Slip op. at 2. The court concluded that although *Congini* and *Douglas* established new causes of action in Pennsylvania, these decisions did not mandate extending social host liability, based on a conspiracy theory, to a group of minors who purchase alcoholic beverages and consume them together. This activity, the *Lattanzi* court concluded, *did not amount to furnishing or serving alcohol to a minor within the context of Congini.*[13] As the

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13. The *Lattanzi* court distinguished those cases cited by plaintiffs in support of their civil conspiracy theory:

> Appellants argue that if, through a "joint venture" with Kevin E. Coffey and Charles Tori, appellants violated a statute designed to prevent the particular harm which occurred in the

court in *Congini* stated:

> Under our analysis, an actor's negligence exists in *furnishing* intoxicants to a class of persons legislatively determined to be incompetent to handle its effects. It is a person's service which forms the basis of a cause of action, not whether or not a putative plaintiff is entitled to recover.

470 A.2d at 518 (emphasis added).

[6, 7] The clear thrust of the courts' analysis in *Congini*, *Douglas* and *Lattanzi* requires that in order for a social host to be found negligent and liable for the damages caused to or by an intoxicated minor, the plaintiff must establish that the defendant actually *furnished* intoxicants to the minor. No Pennsylvania court, however, has specifically addressed the issue of what constitutes "furnishing" or "serving" intoxicants.[14] In order to de-

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instant case, then they should be found "equally culpable either under the Restatement [of Torts Second § 876] or upon a cause of action for civil conspiracy," citing *Jardine v. Upper Darby Lodge*, 413 Pa. 626, 198 A.2d 550 (1976) and *Majors v. Brodhead Hotel*, 416 Pa. 265, 205 A.2d 873 (1965). However, those cases were limited to their facts, which involved situations where liquor *licensees* were held liable under section 493 of the Liquor Code, 47 P.S. § 4-493(1), because they *sold* drinks to a visibly intoxicated person in violation of that section. No allegation was made by the appellants in the present action that either Campbell or Bray were licensees under the Liquor Code. See *Manning v. Andy*, 454 Pa. 237, 310 A.2d 75 (1973) (Concurring Opinion by Pomeroy, J.). As such *Jardine* and *Majors* do not necessarily establish a cause of action here.

14. In *Lattanzi*, the Pennsylvania Superior Court refused to extend the *Congini* exception to minor drinking companions or to those who merely contributed money to a common fund used to purchase alcoholic beverages. It is clear from *Lattanzi*, therefore, that, in Pennsylvania, mere participation in the planning of a party where alcoholic beverages are knowingly going to be served to minors, or attendance at that party, or membership in the organization sponsoring the party, is not enough to invoke social host liability.

fine what conduct amounts to "furnishing" intoxicants, therefore, the court must direct its attention to other jurisdictions that have addressed this issue.

C. *Conduct Amounting to Furnishing/Serving Alcohol*

1. *Possessor of Premises Where Minor Consumed Alcohol*

Plaintiffs argue that the tenant/lessee defendants are liable for permitting a party to be held on premises which they possessed, knowing that alcohol would be illegally served to minors. Plaintiffs contend that these defendants violated their duty as possessors of land in that they could have controlled this dangerous activity by simply not allowing the party to take place or by checking the ages of the party guests at the door.

In *Walker v. Kennedy*, 388 N.W.2d 254 (Minn. 1983), a minor held a party at her parent's residence while her parents were away. It was the specific intention of the party host that minors would attend the party. The guests brought with them liquor for the party. The party host did not supply any of the liquor, but knowingly allowed party guests to consume liquor which had been brought into the house by other party guests. One of the minors in attendance at the party consumed alcoholic beverages while at the residence, and subsequently drove his car into a ditch, resulting in a collision with a third party. The court refused to recognize a cause of action under these facts, stating:

> An essential element for social host liability is that the guest is "*given or furnished*" *alcoholic beverages by the person from whom recovery is sought*. (Citations omitted). Since it is undisputed that Welin [the minor driver] was not "given or furnished" liquor by any member of the Kennedy [host] family, social

NOTES (*Continued*)

Consequently, in the present case, liability premised only upon membership in DKE-Vill or upon attendance at the fraternity party is insufficient to invoke social host liability.

> host liability is inappropriate in the present case, regardless of the fact that Welin was a minor.

338 N.W.2d at 255.

In *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. 632, 485 P.2d 18 (1971), a fraternity entered into an agreement with the owners and operators of the Country Squire Recreation Ranch ("Ranch") for the purpose of holding a fraternity party at the Ranch. Fraternity members provided the alcohol, guests were invited which largely consisted of minor college students, and quantities of alcoholic beverages were consumed. One of the guests became intoxicated, and upon leaving the party, lost control of his automobile and drove into a building, injuring plaintiff, a passenger. Suit was commenced against various defendants, including the owners of the Ranch. Plaintiff alleged that since the owners knew that alcohol would be served to minors at the party, and that some of them might leave the premises by automobile, the owners had a duty to protect the plaintiff from the acts of the guests who might become intoxicated. The Oregon Supreme Court rejected the imposition of any such duty upon the owners of the premises and found that any such duty could only be imposed upon the actual hosts of the parties who actually served the intoxicating beverages.

> *[T]he fact that these defendants furnished the premises for the party should not impose upon them a duty to protect the guests or others from the actions of persons who are allowed to become intoxicated. A failure to supervise would not be negligent because there was no duty to supervise.*

485 P.2d at 22.

[8] This court is persuaded by the reasoning in *Walker* and *Wiener* and finds that *allowing a party on one's premises* does not constitute furnishing alcohol.

and therefore does not invoke social host liability.[15]

2. *Purchasing and Transporting Liquor Served to Minors*

Plaintiffs also contend that the purchasing and transporting of alcoholic beverages ultimately consumed by minors at a party amounts to furnishing alcohol. The court finds no support in this position.

In *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, supra,* an individual member of the fraternity knew of the agreement and arrangement for the party given by the fraternity. That individual member knew that some of the members of his fraternity and other college students in attendance would be minors. Having that knowledge, he purchased alcoholic beverages for the purpose of making them available for the party and had these alcoholic beverages delivered to the ranch where the party was held. The Oregon Supreme Court refused to impose liability upon the fraternity men. The court stated:

> As we have already indicated, there may be circumstances under which a person could be held liable for allowing another to become dangerously intoxicated. However, we feel that *liability should not be extended to one who acts only as a conduit in providing alcohol to those who directly serve it to others*. A host has a choice of serving alcohol to whomsoever he pleases. In making that choice, he may decide to serve the alcohol illegally or under circumstances which create an unreasonable risk of harm to others. *We do not think that the harmful consequences of that choice should be visited upon*

15. The plaintiffs also premise their cause of action against the tenant/lessees on the ground that they participated in a common plan and scheme with other fraternity members to import alcohol to the premises, to invite minors onto the premises, and to make the alcohol available to the minors. The court has already found that Pennsylvania does not recognize such a conspiracy cause of action against a social host.

> *another who has no part in making it and we take this view even where the one supplying the alcohol might have reason to believe that the host is likely to make an unwise choice in dispensing it to others.*

485 P.2d at 22 (emphasis added).

In *Bennett v. Letterly*, 74 Cal.App.3d 901, 141 Cal.Rptr. 682, (1977), the court held that a defendant minor's contribution of money toward the purchase of alcoholic beverages, which were subsequently consumed by a minor companion, did not constitute "furnishing" alcoholic beverages. In *Bennett*, the two minors were the only ones partaking of whiskey, and they poured and mixed their own drinks and served themselves. After consuming his portion of the whiskey, one minor became intoxicated and injured the plaintiff in an automobile accident. In California, as in Pennsylvania, it is a crime for a person to "sell, furnish" alcoholic beverages to any minor. Nonethless, the California court concluded:

> *The undisputed facts are that defendant did no more than contribute $2.00 to $5.00 to a common fund intended to be used for the purchase of liquor. There is no evidence that, once the liquor was purchased and brought back to defendant's house, he exercised any control over, or even handled the bottle of whiskey Howell and Baca consumed.* All the evidence indicates that Howell and Baca consumed the entire bottle of whiskey, pouring and mixing their own drinks and serving themselves. *On these facts defendant was not guilty of furnishing an alcoholic beverage . . .*

141 Cal.Reptr. at 684 (emphasis added).

[9] This court finds, therefore, that one who purchases or transports alcoholic beverages to a party cannot be liable as a social host for serving alcohol to a minor, even if the purchaser or transporter knows the alcohol will be served to minors.

3. *Physically Serving Alcohol Directly to a Minor*

In *Bennett v. Letterly, supra,* the California court stated:

> [T]he word "furnish" has been said to mean: " 'To supply; to offer for use, to give, to hand.' " (Citation omitted). It has also been said the word "furnish" is synonymous with the words "supply" or "provide." (Citation omitted). In relation to a physical object or substance, *the word "furnish" connotes possession or control over the thing furnished by the one who furnishes it.* (Citation omitted). *The word "furnish" implies some type of affirmative action on the part of the furnisher.* Failure to protest or attempt to stop another from imbibing an alcoholic beverage does not constitute "furnishing." (Citation omitted).

141 Cal.Rptr. at 684 (emphasis added).

In *Kelly v. Gwinnell,* 96 N.J. 538, 476 A.2d 1219 (1984), a social host at a private residence served approximately thirteen alcoholic beverages to a guest. The host served the guest even though the guest was visibly intoxicated. The host knew that the guest was going to drive, because the host followed the visibly intoxicated guest to his car, and watched the guest drive off. Additionally, the guest was served directly by the host, and both the guest and the host were adults. After recognizing a cause of action against the social host for injuries sustained by a third party, the New Jersey Supreme Court was careful to limit its holding to the very particular factual situation presented and, anticipating the possibility of more widespread litigation attempting to expand the liability of a social host, held that:

> Given the facts before us, we decide only that where the social host *directly serves* the guest and *continues to do so* even after the guest is *visibly intoxicated knowing that the guest will soon be driving home*, the social host may be liable for the consequences of the resulting drunken driving. We are not faced with a party where many guests congregate, nor with guests serving each other, nor with a host busily occupied with other responsibilities and therefore unable to attend to the matter of serving liquor, nor with a drunken host.

476 A.2d at 1228.

[10] It is abundantly clear from a review of all of the above cited cases that "furnishing" alcohol concerns a very specific and limited activity—*namely, the physical act of serving alcoholic beverages directly to a minor guest*. That is to say, only those who actually serve alcohol directly to a minor guest or are in a position to *exercise complete control over the actual dispensing of the alcohol, can be subject to social host liability*. In the present case, there is no evidence before the court that any of the defendants were authorized to exercise complete control over the direct dispensing of alcohol to the guests.[16] Therefore, for the purpose of the motions before the court, only those defendants whom a jury could reasonably conclude physically served alcohol directly to Corbin Evans during the September 25-26 party can remain as defendants.

Based on plaintiffs' written offers of proof, as supplemented orally at the hearing on September 12th,

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16. Plaintiffs do contend that the lessee defendants, as possessors of the premises where the party was held, were in a position to exercise control over the dispensing of the alcohol in that they could have forbid allowing the party to be held on their premises, or could have checked the ages of the guests at the door. As previously discussed, however, mere possession of the premises where alcohol is served to minors is not enough to invoke social host liability.

the court finds that there is no evidence whatsoever, in either the Fassett or Buckley case, that any of the originally named defendants, other than Christopher Troy, actually served alcohol directly to Corbin Evans. While both complaints allege that "all" of the defendants "caused to be served" or "provided" alcohol to Corbin Evans, these general and conclusory allegations fail to state a valid cause of action. Although the evidence suggests that numerous people served as bartenders during the party, plaintiffs were required to present factual allegations as to each individually named defendant, evidencing that he or she directly served alcohol to Corbin Evans. Other than as to defendant Troy, plaintiffs have failed to do so.

[11] As to Christopher Troy, the court is persuaded that there is a genuine issue of fact as to whether Mr. Troy served alcohol directly to Mr. Evans. At the Septemper 12th hearing, counsel for Buckley stated to the court:

> During his deposition it turned out that he [Christopher Troy] worked the bar for part of the time, serving drinks in what he described, I believe, as a free-pour manner to various people who were at the party, some of whom were under the age of 21.

Counsel for Fassett concured in this offer of proof. Although counsel for Troy vigorously disputes that Mr. Troy served alcohol to Corbin Evans, this is a question of fact for the jury. A jury could reasonably infer from the fact that Mr. Troy served as a bartender for at least a portion of the party, that he, in fact, served alcohol to Corbin Evans.[17]

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17. That is not to say that, after hearing all of plaintiff's evidence at trial, the court might not find such an inference too speculative. The court only finds that plaintiff's offer of proof satisfies their burden for the purpose of defendant Troy's motion for summary judgment.

As to the third-party defendants, in the Fassett case only Corbin Evans and Nicholas D'Alessandro, the drivers of the automobiles involved in the accident, will remain as parties. Since, in light of the court's ruling above, Bacha is no longer a defendant in the Fassett case, his third-party complaint is rendered moot. Consequently, the court cannot consider third-party plaintiff Bacha's offer of proof.

In the Buckley case, Corbin Evans and Nicholas D'Allesandro will remain as third-party defendants. Additionally, Peter J. Wynne will remain as a third-party defendant. This is based on third-party plaintiff Troy's assertion in his written offer of proof that Mr. Wynne served as a bartender for a portion of the party. Again, a jury could reasonably infer that Mr. Wynne served alcohol directly to Corbin Evans. Since Troy's offer of proof did not state that any other particular third-party defendant served as a bartender or otherwise served alcohol directly to Corbin Evans, all the remaining third-party defendants are dismissed.[18]

The court is not unmindful of the tragedy and hardship that has befallen the parties and the persons associated with the parties in the series of events chronicled in this Opinion. Despite the natural temptation to apply to law to in some way satisfy or relieve the suffering by those affected by the events the court must, as it believes it has done, decide the case in accordance with the law. This Opinion represents what this court believes the law is on each of the addressed issues.

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18. Peter Wynne will not remain as a third-party defendant in the Fassett case because Christopher Troy did not bring a third-party action against Wynne in the Fassett case.

Supreme Court, U.S.
FILED
MAY 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

January Term, 1987
No. 86-1655

BRUCE TURGISS,
Petitioner

v.

ANNE FASSETT,
Respondent

and

JOHN L. BUCKLEY, JR.
Administrator of the Estate of
MONICA T. BUCKLEY, Deceased,
Respondent

RESPONSE MEMORANDUM OF RESPONDENT LOUIS D'ONOFRIO

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QUESTION PRESENTED FOR REVIEW

1. Whether the courts of appeals lack jurisdiction of an appeal by plaintiffs who have voluntarily dismissed their actions without prejudice by stipulation where plaintiffs seek to test interlocutory orders of the trial court rendering summary judgment in favor of and dismissing complaints against some, but not all, of the defendants and third-party defendants.

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STATEMENT OF THE CASE

Monica Buckley was killed and Anne Fassett was severely injured in automobile accident immediately following a fraternity party which they and the driver of the automobile had attended. Beer and liquor had been served at the party. Separate actions for the death and injuries were brought in the District Court for the Eastern District of Pennsylvania in which the plaintiffs alleged that Corbin F. Evans, the driver of the automobile in which Buckley and Fassett were passengers, had become intoxicated at the fraternity party and that the defendants were liable for conducting the fraternity party and causing liquor to be served to Evans, who was a minor. Various officers of the local chapter of the fraternity, its local and national chapters, and the tenants of the private residence where the party was held were named as defendants. One of the tenants subsequently became a third-party defendant in the Buckley action and one of the officers subsequently became a third-party defendant in the Fassett action.

Evans and Nicholas D'Alessandro, the driver of the second automobile involved in the accident, were joined as third-party defendants. Individual members of the local chapter of the fraternity were joined by defendant Christopher L. Troy as third-party defendants in the Buckley action and as second-level third-party defendants by third-party defendant Michael Bacha in the Fassett action.

The actions were consolidated for trial and assigned to the Honorable Louis Bechtle, J., of the United States District Court for the Eastern District of Pennsylvania. After extensive discovery and pretrial conferences Judge Bechtle concluded that there was no evidence upon which a jury could find anyone but defendant Troy and third-party defendant Peter J. Wynne, one of the members of the fraternity, liable for serving liquor to the minor driver Evans under applicable Pennsylvania law.

Judge Bechtle therefore granted motions for summary judgment and for dismissal of various third-party complaints which left the tenant Troy as the only defendant in both actions, and the two drivers, Evans and D'Alessandro, as third-party defendants in both actions, and Wynne as a third-party defendant in the Buckley action only. The District Court expressly declined to enter the necessary judgments or certify them pursuant to F.R.C.P. 54(b). R.561-2a.

Plaintiffs, however, did not wish to proceed to trial against defendant Troy and the remaining third-party defendants for economic and practical reasons of their own; because they had state court actions pending against Troy, his insurance was limited, and the costs of trial. R.561-3a, App. A-18-19.

When the case was called for trial on September 23, 1985, plaintiffs and the other remaining parties filed a stipulation of voluntary dismissal without prejudice pursuant to F.R.C.P. 41(a)(1). R.570a, 571a. Each plaintiff then filed a Notice of Appeal purporting to appeal from the prior Orders of September 17, 1985, which had granted the motions for summary judgment and for dismissal of the third-party complaints. R.573a, 575a.

The appeals were heard before a three member panel of the United States Circuit Court of Appeals for the Third Circuit consisting of Judges Adams, Stapelton and Garth, Jj. A majority of the panel, in an Opinion by Judge Garth, held that it had jurisdiction over the appeals because the voluntary dismissal as to the only remaining defendant, Troy, was final and appealable since the Pennsylvania statute of limitations had run and plaintiffs had disclaimed at oral argument any intention of reinstituting the federal court action against Troy. App. p. A-14-19. Judge Adams dissented on the grounds that the dismissal without prejudice was not a final order because the plaintiffs retained their causes of action against Troy since the bar of the statute of limitations was an affirmative defense which might not be pleaded

and because representations at oral argument are not of record and, in any event, counsel for defendant Troy had agreed not to assert the statute of limitations defense if plaintiffs lost their appeal and an action was reinstituted against Troy. App. p.A-41-44.

The majority of the panel reversed Orders of the District Court granting the summary judgments and dismissals, holding that all defendants who intentionally rendered substantial assistance to Evans' consumption of liquor could be held liable, and remanded for further proceedings in the District Court in accordance with that holding. App. p. A-36.

A Petition for Rehearing *en banc* was denied on January 9, 1987. Petitioner Bruce Turgiss, in whose favor the District Court had entered a summary judgment, who had been a defendant, filed this Petition for Writ of Certiorari on April 13, 1987. The Petition was promptly served and received by Respondent Louis D'Onofrio on April 14, 1987.

Respondent D'Onofrio files this Response Memorandum in order to assert before this Court that, regardless of whether plaintiffs' voluntary dismissal without prejudice of their actions was or was not a final order, the Circuit Court of Appeals lacked jurisdiction over plaintiffs' appeals because they voluntarily dismissed their actions without prejudice and such dismissal was not adverse to them and cannot be appealed by them.

Respondent D'Onofrio otherwise supports, without repeating, the Petitioner's contention that this Court should grant the Petition in order to review the action of the court below with regard to conformity to the requirements that federal courts must apply the substantive law of the states in a diversity case.

SUMMARY OF ARGUMENT

Plaintiffs who stipulate to the voluntary dismissal of their causes of action without prejudice may not prosecute appeals from the final determination which results from their voluntary dismissals since that determination is only that which they themselves procured and is not adverse to them.

Appellate courts lack jurisdiction to hear and determine appeals by plaintiffs who have voluntarily dismissed their action without prejudice and the Court of Appeals for the Third Circuit erred in holding that it had jurisdiction over such appeals in this case. Since it lacked jurisdiction over the appeals it also lacked jurisdiction to reverse interlocutory orders of the trial court finding in favor of some, but not all of the defendants and third-party defendants.

The appellate court also erred in basing its holding that it had jurisdiction over these appeals solely upon its determination that the voluntary dismissal without prejudice was a final determination. The voluntary dismissals here constituted a final determination because those dismissals completely disposed of the case in the trial court by dismissing the action as to the only remaining defendant and the remaining third-party defendants. While those dismissals may constitute a final determination since they completely dispose of the case in the trial court, the appellate court nonetheless lacks jurisdiction over the plaintiffs' appeals because that determination was voluntary and without prejudice and was the determination which the plaintiffs sought and therefore was not adverse to them

The holding of the Court of Appeals for the Third Circuit that it had jurisdiction over these appeals directly conflicts with decisions in the Fifth, Seventh and Ninth Circuits, and if permitted to stand would permit plaintiffs to determine for themselves when they may appeal and what issues they may bring before the appellate court on

those appeals. Upholding jurisdiction over the appeals in this case also directly conflicts with the provisions of Rule 54(b) of the Federal Rules of Civil Procedure and its prohibition against appeals from interlocutory orders determining the rights of less than all of the parties.

The issue of lack of jurisdiction was directly presented in the appeals in this case.

This Court should grant the Petition and hold that the appellate court lacks jurisdiction over appeals by plaintiffs who have voluntarily dismissed their causes of action without prejudice, and therefore vacate the Order of the appellate court and dismiss the appeals in this case.

ARGUMENT

A Plaintiff Who Voluntarily Stipulates to the Dismissal of His Action Without Prejudice May Not Appeal Because Such a Dismissal Is Not Adverse to That Plaintiff, and The Circuit Court of Appeals Lacks Jurisdiction Over Such an Appeal.

The plaintiffs in both of these consolidated cases entered into a stipulation with the remaining defendant and third-party defendants pursuant to Rule 14(a)(1) and filed that stipulation immediately prior to the scheduled trial of their cases. Plaintiffs then filed appeals which purported to be appeals from prior orders of the trial courts which had entered summary judgments in favor of some, but not all, of the defendants and dismissed third-party complaints against some, but not all, of the third-party defendants. The stipulation by plaintiff Fassett expressly stated that the dismissal of her complaint was "without prejudice" (R.571a); the stipulation by the plaintiff in the Buckley case did not so state, but was without prejudice under Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure since it was not stated to be other than without prejudice. No action by the court was taken on these stipulations.

The holding by the Court of Appeals for the Third Circuit that it had jurisdiction over the appeals by plaintiffs who had voluntarily dismissed their actions without prejudice directly conflicts with decisions of the Courts of Appeals for the Fifth, Seventh and Ninth Circuits. In *Management Investors v. United Mine Wkrs., Etc.*, 610 F.2d 384 (5th Cir. 1979) the trial court had dismissed the plaintiff's pendent state claims whereupon the plaintiff moved for and was granted a voluntary non-suit without prejudice of its remaining federal claim; on appeal the court held that plaintiffs could not appeal from the order of the trial court granting the dismissal in accordance with the general rule that a plaintiff who has requested and been granted or agreed to a voluntary dismissal of his action without prejudice cannot maintain or prosecute an appeal from the order of dismissal. *Id.* at 393. In *Geaney v. Carlson*, 776 F.2d 140 (7th Cir. 1985) the court held that it lacked jurisdiction over an appeal by a plaintiff who had by motion requested dismissal of his suit while noting that he intended to appeal from that dismissal because of dissatisfaction with a prior interlocutory order; the trial court interpreted the motion as one for voluntary dismissal pursuant to F.R.C.P. 41(a)(1)(i). On appeal the court found no jurisdiction on the ground that if the motion was interpreted as a voluntary dismissal without prejudice there was no appellate jurisdiction because the dismissal was not adverse, and if the motion were interpreted otherwise there was no jurisdiction for other reasons. In *Fletcher v. Gagosian*, 604 F.2d 637 (9th Cir. 1979) the trial court had dismissed the plaintiff's complaint as to less than all of the defendants and plaintiffs then voluntarily dismissed as to the remaining defendants without prejudice under F.R.C.P. 41(a) and subsequently appealed, purporting to appeal from the dismissal of the complaint; the appellate court held that it lacked jurisdiction over such an appeal.

The decision in this case also directly conflicts with other decisions which hold that a plaintiff who procures

a dismissal of his action may not appeal the dismissal on the merits even though he may appeal from that portion of an order entered by the trial court which attached onerous conditions to the dismissal. In *Yoffe v. Keller Indus., Inc.*, 580 F.2d 126 (5th Cir. 1978) the plaintiff moved for voluntary dismissal without prejudice pursuant to Rule 41(a)(2) which the defendant opposed, and the trial court granted the motion in an order which also required the plaintiff to pay $134,000 in counsel fees to the defendant's attorneys. The appellate court recognized the validity of the general rule that where the trial court allows plaintiff to dismiss without prejudice the dismissal constitutes a final judgment for purposes of appeal but that a plaintiff cannot appeal therefrom since it does not qualify as an involuntary adverse judgment so far as the plaintiff who procured it is concerned. *Id.* at 129. The court concluded that the amount of the fees constituted legal prejudice and reviewed that portion of the order since the plaintiff had never acquiesced in the assessment of fees or the amount, held that the amount was reasonable, and therefore concluded that plaintiff could not bring the appeal and dismissed it. *Id.* at 131. The decision in the *Yoffe* case was consistent with other decisions in the Fifth Circuit which permitted review of conditions attached to dismissal orders, but not review of the dismissal of the case, finding that the conditions were improper and constituted legal prejudice, and therefore remanding for reconsideration of the conditions. *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976); *Alvarado v. Maritime Overseas Corp.*, 528 F.2d 605 (5th Cir. 1976). In *Cauley v. Wilson*, 754 F.2d 769 (7th Cir. 1985) the court put those decisions of the Fifth Circuit in perspective, concluding that a plaintiff may not appeal a voluntary dismissal without prejudice, but an appellate court should be able to decide whether the trial court erred in attaching the conditions and that an

appeal relating to the conditions should be heard and decided without regard to the lack of appellate jurisdiction over the case itself. *Id.* at 771.

This court has recognized ". . . the familiar rule that a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error." *United States v. Procter & Gamble Company,* 356 U.S. 677, 680 (1958). In that case the plaintiff had been ordered by the trial court to produce various documents to its opponent for inspection but was unwilling to do so and therefore filed a motion in the trial court to have its order amended to provide that if production were not made the court would dismiss the complaint; the trial court entered such an order and subsequently dismissed the complaint when the plaintiff failed to produce the documents. This court held that the 'familiar rule' had no application in that case because the plaintiff had not assented but had always opposed the production orders and had, like the plaintiff in *Thomsen v. Cayser,* 243 U.S. 66 (1917), not consented to or procured the order involved but only suggested that if there should be such an order it should be in a final form rather than interlocutory. This Court treated the actions of the plaintiff in both of those cases as being involuntary and the dismissal orders in both cases were with prejudice and therefore were treated as a final determination against the plaintiffs of the entire case. In *United States v. Wallace & Tiernan Co.,* 336 U.S. 793 (1949) this Court declined to dismiss an appeal where the trial court had dismissed the plaintiff's action without prejudice after it had denied the plaintiff's motion for production of documents which were essential to the plaintiff's case because it found nothing in the record to indicate that the plaintiff had invited the entry of the dismissal order. *Id.* at 794, fn1. This court also noted there that the fact that the dismissal was without prejudice did not render dismissal unappealable because the dismissal ended the action so far as the trial court was concerned. *Ibid.*

Respondent submits that the Court of Appeals incorrectly formulated the issue of its appellate jurisdiction over plaintiff's appeals in this case by posing the question of its jurisdiction as one of finality and basing its assumption of jurisdiction on the conclusion that the dismissal was final. The Petitioner here continues to present the question as one of finality. Petition, p. 7-14. Plaintiff's voluntary dismissal was a final order because it fully terminated the case before the district court (*see United States v. Wallace & Tiernan Co., supra.*). Although the voluntary dismissal was final in the sense that it terminated the proceedings, it was not a final determination from which these plaintiffs could appeal since the plaintiffs themselves procured the dismissals, and the dismissal which they themselves sought was therefore not adverse to them.

Plaintiff's voluntary dismissal here was an action which they themselves took, without any approval or action by the trial court, and after the trial court had expressly declined to certify its prior rulings so as to render them final judgments subject to appeal under F.R.C.P. 54(b). Both actions remained viable until they were voluntarily dismissed without prejudice by the plaintiffs; the decision of the plaintiffs not to try the case when called was a decision which they alone made for reasons of their own convenience and expense. That decision was entirely voluntary and uncoerced by the trial court.

Rule 54 of the Federal Rules of Civil Procedure controls what orders of the trial court are appealable and what orders are not. Rule 54 provides that, in the absence of an express determination that there is no just reason for delay and an express direction for the entry of a final judgment, an order which adjudicates the liabilities of fewer than all of the parties does not terminate the action as to any of the parties and is subject to revision at any time before the entry of judgment as to the liabilities of all parties. Rule 54 therefore prohibits an appeal from the interlocutory orders of the court entering

summary judgments and dismissing third-party complaints as to only some of the defendants and third-party defendants. Neither these plaintiffs nor other plaintiffs ought to be permitted to prosecute appeals in cases which they themselves voluntarily dismiss and thus determine for themselves when and what they may appeal. If plaintiffs decide that they do not wish to pursue their actions and voluntarily dismiss them, the dismissal is only that which they themselves sought and one which they ought not to be permitted to appeal in order to attack interlocutory orders with which they are dissatisfied.

This Court should therefore vacate the order of the United States Court of Appeals for the Third Circuit entered December 5, 1986 and dismiss the appeals at Nos. 85-1652 and 85-1653 in that court.

The issue of lack of appellate jurisdiction over an appeal where the plaintiffs have voluntarily dismissed their appeal without prejudice was properly preserved and presented to the appellate court. The majority of the appellate court in its Opinion (App. p. A-13-14) notes that the majority of the third-party defendants filed motions for dismissal with the appellate court and that these motions were granted by a motions panel without prejudice to the rights to reinstate third-party complaints in the event of reversal, and that it therefore did not consider any brief which had been filed by those third-party defendants. Respondent D'Onofrio did *not* move for dismissal of the appeal as to him, and the motions panel did *not* dismiss the action as to him. Respondent D'Onofrio specifically presented for review the issue of the appellate court's lack of jurisdiction over an appeal by plaintiffs who voluntarily dismissed their actions (Brief for Appellee Louis D'Onofrio, p. 2) and argued that the appellate court lacked jurisdiction over the plaintiffs' appeals because they had voluntarily dismissed their action and could not appeal from that dismissal which was not adverse to them. (Brief, p. 14-22). Counsel for respondent D'Onofrio did attend the oral argument, at which

only counsel for plaintiffs and one defendant were heard. The appellate court did consider and decide the issue of its appellate jurisdiction. Consequently, the issue of lack of jurisdiction in the appellate court to hear or determine these appeals was squarely presented, both in the form under which the court decided it and in the form in which respondent D'Onofrio seeks to present it before this Court.

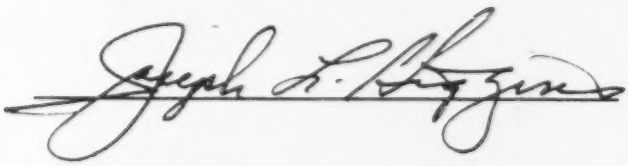
CONCLUSION

Plaintiffs who voluntarily dismiss their actions without prejudice may not prosecute appeals in those actions because the final determination resulting from their voluntary dismissals is not adverse to them and the appellate court therefore lacks jurisdiction over appeals by them. Since the appellate courts lacked jurisdiction over these appeals it similarly lacked jurisdiction to reverse otherwise interlocutory orders of the trial court and remand the cases for trial against defendants in whose favor the trial court had previously found by entering summary judgments or dismissals of complaints against them.

The decision of the United States Court of Appeals for the Third Circuit in this case that it had appellate jurisdiction over these appeals conflicts with the decisions of the Fifth, Seventh and Ninth Circuits and with the provisions of Rule 54(b), and with the policy of this Court prohibiting piecemeal appeals.

This Court should therefore grant the Petition for Certiorari and vacate the Order of the appellate court and dismiss plaintiffs' appeals.

Respectfully submitted,



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